Supreme Court, U.S.
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No. 06-609

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In the Supreme Court of the United States

JOHN TARTER,

Petitioner,

v.

WILLIAM THOMAS GREGORY,

Respondent,

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether it was clearly established in 1992 that a police officer could not lawfully conduct a one-on-one identification procedure?

2. Whether it was clearly established in 1992 that a suspect could not waive his right to refuse to participate in a one-on-one identification procedure?

3. Whether a police officer may be liable under 42 U.S.C. § 1983 despite the intervening actions of prosecutors and judges?

Parties to the Proceedings Below

The parties to the proceedings before the United States Court of Appeals for the Sixth Circuit, which involved three consolidated appeals (04-585/5859/6482), are Defendants-Appellants/Cross-Appellees John Tarter, Dawn Ross Katz, Joe Carroll, and Steve Clark; Defendants-Cross-Appellees City of Louisville, Louisville Division of Police, Hope Greer, Darrell Ammon, Wayne Kessinger, Jay Pierce, Eugene Sherrard, and Luanne Thomas; and Plaintiff-Appellee/Cross-Appellant William Thomas Gregory. The following persons were named as Defendants in the District Court but were not made parties to the appeal: L.E. Burgin, Roy Sturgill, and Billy Wellman.

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Opinions Below

The decision of the United States Court of Appeals for the Sixth Circuit is officially reported at 444 F.3d 725 and is reproduced at App. B, *infra*, pp. 3a-71a. The interlocutory order of the United States District Court for the Western District of Kentucky, dated June 22, 2004, is unreported and is reproduced at App. C, *infra,* p. 72a-76a. The interlocutory order of the United States District Court for the Western District of Kentucky, dated March 29, 2004, is unreported and is reproduced at App. D, *infra,* pp. 77a-107a. The orders of the District Court denied Petitioner's motion for summary judgment asserting qualified immunity.

Jurisdiction

The decision of the United States Court of Appeals for the Sixth Circuit was entered on April 11, 2004. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1, because it is being filed within 90 days of the August 1, 2006, denial of Petitioner's Petition for Rehearing and Suggestion for Rehearing *en banc*, which is unreported and reproduced at App. A, *infra,* pp. 1a-2a. This Court has jurisdiction to review the decision of the United States Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. § 1254.

Statutory Provisions Involved

The relevant statutory provision is 42 U.S.C. § 1983, which provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Statement of the Case

A. Procedural History

This matter arises out of a complaint brought under Title 18, Section 1983 on August 24, 2001, alleging violation of the Respondent's civil rights. The action was removed to the United States District Court for the Western District of Kentucky on September 14, 2001, under the District Court's federal question jurisdiction in 28 U.S.C. § 1331.

On March 29, 2004, the District Court denied Petitioner John Tarter ("Tarter," or "Detective Tarter")'s motion for summary judgment, filed on the basis of qualified immunity. The District Court's order granted the motions for summary judgment of defendants City of Louisville, Joe Carroll, Steve Clark, Luanne Thomas, Darrell Amon, Wayne Kessinger, Jay Pierce, and Eugene Sherrard, and denied the motions for summary judgment of defendants Dawn Katz and Tarter. On a motion for reconsideration, the District Court reinstated claims against defendants Carroll, Clark and Katz for non-testimonial pre-trial acts.

On July 7, 2004, Tarter filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit, invoking

that Court's jurisdiction under 28 U.S.C. § 1291. On April 11, 2004, the United States Court of Appeals for the Sixth Circuit affirmed the denial of summary judgment to Tarter, and affirmed the District Court's other rulings in part and reversed those rulings in part. The Court of Appeals denied the Petition for Rehearing and Suggestion of Rehearing *en banc* of all defendants other than Katz on August 1, 2006.

Dawn Ross Katz petitioned this Court for *certiorari* on July 1, 2006, No. 06-171.

B. Factual Background

On June 1, 1992, Mrs. V[1] awoke to find a nude man wearing a pair of pantyhose on his head in her bedroom in an apartment complex in Louisville, Kentucky. The man choked Mrs. V, fondled her breasts, and attempted to rape her. The two struggled, and Mrs. V pulled the pantyhose off of the man's head. She broke free and fled the apartment, as did the assailant. When she returned, she found that her television and CD player had been stolen.

Mrs. V described her assailant to a number of her neighbors and her mother, who believed the description fit another resident of the apartment complex, Respondent William Thomas Gregory ("Gregory"). Later that day, Mrs. V saw Gregory in the apartment complex, and she called the police to the scene. The police searched Gregory's apartment, but found nothing of evidentiary value.

Defendant Louisville Police Detectives Carroll and Clark showed Mrs. V a photopack containing Gregory's

[1] The District Court and Court of Appeals referred to the victims by initials.

photograph. She first stated she was unable to identify anyone without seeing him in person. When she was asked to pick the person who looked most like her assailant, she chose someone other than Gregory. Mrs. V's mother looked through the photopack as well, and she identified Gregory as the man who lived in the apartment complex.

Later that day, Mrs. V's mother called the police to report that Mrs. V had seen Gregory in person at the apartments, and she was sure he was the assailant. With the help of Detectives Clark and Carroll, Mrs. V filed a criminal complaint against Gregory, and he was arrested. The two detectives testified they never told Gregory what items had been stolen from Mrs. V's apartment, but they heard Gregory call a friend and tell him what items were stolen. Gregory disputes the testimony, claiming the detectives told him what had been stolen.

Katz, a Kentucky State Police Laboratory Examiner, conducted comparisons of Gregory's hair with hairs found in the pantyhose. She concluded "Mr. Gregory's head hair standard was similar in color and microscopic characteristics with the Negroid hairs recovered from the pantyhose." Katz noted that five hairs from the pantyhose were similar to Gregory's hair. Two other hairs were found in the pantyhose, however, of which one was a Negroid hair. Katz's notes did not reference these two other hairs, nor did she mention them to the prosecutors or investigators.

A second attack occurred in the same apartment complex on July 19, 1992, on Ms. S, age 71. Ms. S was awakened by a nude black man in her apartment, who had entered through her sliding glass door. He threatened her with a large bread knife and attempted to rape her before leaving the apartment.

Tarter, a Louisville Police Detective, learned from other officers that Gregory had been arrested for a similar type of offense in the same apartment complex a month before. He and another detective showed Ms. S a photopack with Gregory's picture, but she was unable to identify anyone.

Detective Tarter approached Gregory and his attorney after a court appearance on the Mrs. V case, and he asked them to come to his office at the police station for questioning about the rape of Ms. S. According to Gregory, Detective Tarter initially told him he wanted Gregory to appear in a line-up, but when coming to the police station, told him a line-up would take some time to arrange and asked if he would agree to a one-on-one identification procedure with the victim instead. Detective Tarter told him if Ms. S identified him he would be arrested, and if she did not, he would be cleared as a suspect. Detective Tarter did not tell Gregory or his attorney that Ms. S had been unable to pick him out of the photopack.

Gregory asked to speak to his attorney in private before deciding, and Detective Tarter left the room while they conferred. Eventually, Gregory and his attorney agreed to the identification procedure, and they signed a pre-printed written waiver form, which stated:

> I, William Thomas Gregory, hereby waive my right and privilege to stand in a line-up for a possible identification concerning crimes or offenses for which I am a suspect. I hereby agree to stand in a one-on-one system of identification before witnesses or victims of crimes or offenses of which I am a suspect for purposes of identification. I have not been threatened or promised anything by any officers or detectives of the Louisville Division of Police to

> persuade me to sign this form freely and voluntarily. I am fully aware of the nature of this process and realise [*sic*] the consequences of an identification and intelligently waive my right to a police line-up.

(The waiver form is reproduced at App. E, p. 108a). Ms. S positively identified Gregory as her attacker, and Detective Tarter placed him under arrest.

One month later, while Gregory was in custody, another rape occurred not far from the apartment complex where Mrs. V, Ms. S and Gregory lived. A black man broke into the apartment of Ms. B and raped her while threatening her with a knife. She was unable to pick her assailant out of a photopack. Police detectives created a composite drawing of Ms. B's assailant from her description, and it was placed in the file for the Mrs. V and Ms. S assaults. The drawing was shown to Gregory's counsel in the course of discovery.

On June 28, 1993, while Gregory was still in custody, another assault took place in a different part of Louisville. A black man broke into the apartment of Ms. R and raped her at knife-point. Although Detective Tarter did not lead the investigation of this rape, he was present when another detective questioned Ms. R about the case. Timothy Maypray was arrested and eventually convicted of this rape. None of the defendants informed Gregory's counsel about this case.

Before trial, Gregory moved to suppress the one-on-one identification of Ms. S. The trial court denied the motion and permitted the testimony about the identification, finding that Gregory had waived his right to contest it. The trial court considered Gregory's argument that he had signed the waiver before learning that Ms. S had been unable to identify him

from the photopack, but the trial court found the lack of that knowledge did not affect the validity of the waiver.

The two cases were consolidated for trial. Mrs. V identified Gregory as the perpetrator at trial, and Detectives Clark and Carroll testified that Gregory had demonstrated knowledge of what items had been stolen from Mrs. V's apartment. Katz testified that the hairs from the pantyhose were consistent with Gregory's hair.

Ms. S also identified Gregory as her assailant at trial, and she testified that she had been unable to identify him in the photopack. Detective Tarter testified about the one-on-one identification. He also testified about the discovery of a tire iron discovered near the sliding glass door to Ms. S's apartment, that the tool fit the spare tire in Gregory's car, and that Gregory's tire iron was missing from his car. Gregory's lawyer argued, among other things, that the rape of Ms. B while Gregory was in jail demonstrated another rapist had committed all three crimes. The jury convicted Gregory on all counts and sentenced him to seventy years in prison.

The Kentucky Supreme Court unanimously upheld the conviction. On the admission of the one-on-one identification procedure, the Kentucky Supreme Court agreed with the Circuit Court that Gregory had executed a knowing and intelligent waiver, even though he did not know Ms. S had been unable to identify him in a photopack:

> The U.S. Supreme Court held that a valid waiver does not require that the defendant be given all of the information that might be useful in making a decision to waive his rights. Moran v. Burbine, 475 U.S. 412, 422 (1986). . . . Simply because appellant was not apprised of the fact that a previous identification

> attempt had failed, his consent to the show-up cannot be considered involuntary.

(Kentucky Supreme Court Opinion, reproduced at App. F, pp. 111a-112a).

In 1999 and 2000, Respondent's counsel retested the hairs found in the pantyhose with DNA techniques which were not available in 1992. The tests revealed the hairs could not have belonged to Gregory. Gregory was released from prison on August 25, 2000, and the Commonwealth's Attorney elected not to retry him.

C. Summary of Gregory's Claims and the Court of Appeals Opinion

Gregory brought suit against the City of Louisville and eight police officers who were either involved in his case or acted in supervisory capacities. He also sued Katz, her supervisors, and the Kentucky State Police. On motions for summary judgment by the defendants, as modified by the District Court's order on motions for reconsideration, the District Court granted the motions of the City of Louisville and supervisory police officers Ammon, Pierce, Kessinger, Sherrard and Thomas, and it denied the motions of Clark, Carroll, Tarter, and Katz.

The Court of Appeals affirmed in part and reversed in part. The Court of Appeals affirmed the District Court's ruling Katz, Carroll and Clark did not have absolute immunity for their pretrial acts, and reversed on the claims against the City of Louisville, finding liability for failure to train its officers and having unconstitutional customs or policies.

The Court of Appeals affirmed the District Court's rulings regarding Detective Tarter. It found issues of disputed fact prevented summary judgment in his favor on the claims for failure to disclose the rape of Ms. R and for false arrest of Gregory. The Court of Appeals found Gregory had stated a claim for violation of a constitutional right by the one-on-one identification procedure, holding that "[c]riminal suspects have a right to be free from identification procedures 'so unnecessarily suggestive and conducive to mistaken identification' that the identification's use violated due process of law." (Opinion, p. 36a, quoting *Stovall v. Denno,* 388 U.S. 293, 302 (1967)).

The Court of Appeals also found that it was "clearly established" in 1992 that a one-on-one identification procedure was unconstitutional, because "the Supreme Court has held that police officers must evaluate the totality of the circumstances and reach a reasoned conclusion as to whether an identification procedure is unduly suggestive or not." (Opinion, p. 36a).

The Court of Appeals rejected Detective Tarter's argument that Gregory had waived his right to object to the identification, upholding the District Court's ruling that there was a disputed issue of fact as to whether the waiver was "knowing[], intelligent[], and voluntary[]." It did not squarely address Detective Tarter's argument that it was not clearly established that it was constitutionally impermissible for him to conduct such an identification procedure. (Opinion, p. 37a).

Finally, the Court of Appeals also rejected Detective Tarter's argument that the decision of the prosecutor to offer evidence of the identification procedure, the decision of the trial court to admit the evidence, and the decision of the

Kentucky Supreme Court to uphold the conviction were superseding causes of Gregory's injuries and broke the chain of causation. (Opinion, p. 38a).

Reasons for Granting the Petition

I. The Decision Below Conflicts with Other Federal Decisions Which Grant Qualified Immunity Unless a Police Officer Violates a Clearly Established Right.

The decision of the Court of Appeals conflicts with the decisions of this Court and other Courts of Appeal that a police officer cannot be held liable unless the contours of the right violated had been clearly established in its particular factual context. The Court of Appeals for the Sixth Circuit held, contrary to the ruling of this Court and other Courts of Appeal, that the admonition to examine "the totality of the circumstances" in decisions of this Court constituted sufficient warning to Detective Tarter that his conduct was unlawful. This standard for holding a police officer civilly liable conflicts with this Court's decisions in *Brousseau v. Haugan,* 543 U.S. 194 (2004) (*per curiam*) and *Saucier v. Katz*, 533 U.S. 194 (2001).

Moreover, the underlying basis for the decision that Detective Tarter's conduct of the identification procedure violated a clearly established right – that such a right exists under the Due Process Clause -- conflicts with the decision of the Seventh Circuit Court of Appeals in *Hensley v. Carey*, 818 F.2d 646 (7th Cir. 1987), that there is no constitutional right to be free of suggestive identification procedures.

This Court has established that to overcome a defense of qualified immunity, the plaintiff must (1) identify a clearly established right alleged to have been violated, and (2)

establish that a reasonable officer in the defendant's position would have known that the conduct at issue was undertaken in violation of that right. *Brousseau v. Haugen,* 543 U.S. 194, 197 (2004) (*per curiam*). A vague admonition relating to the conduct is not enough. On the contrary, the law requires a court to examine the particular circumstances of the case and decide if the contours of the rule were clearly established in that particular factual situation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

In *Saucier v. Katz,* the Supreme Court held that whether a right is "clearly established" must be examined in the particular circumstances of an individual case. *Id.* at 206. A decision on the application of qualified immunity, in many cases, may depend on the level of generality at which the relevant legal rule is identified. *Saucier* followed prior decisions which had established that "although it need not be the case that the very action in question has previously been held unlawful, . . . in the light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In every case, however, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.*

The Court reaffirmed that rule in *Brosseau v. Haugen*, 543 U.S. 194 (2004) (*per curiam*). There, the Court held the principles enunciated in *Tennessee v. Garner,* 471 U.S. 1 (1985), and *Graham v. Connor,* 490 U.S. 386 (1989) for excessive force did not contain the specificity necessary to inform a police officer that the use of deadly force in a particular circumstance was forbidden. *Brosseau v. Haugen*, 543 U.S. at 200.

No decision of this Court would have given the specific admonition to Detective Tarter that the identification procedure he used was wrong, because no decision has ever held that one-on-one identification procedures are impermissible in all circumstances. Indeed, this Court's decisions have established that "the admission of evidence of a showup without more does not violate due process." *Neil v. Biggers*, 409 U.S. 188, 198 (1972).

The Court began its analysis of one-on-one identification procedures in the case of *Stovall v. Denno*, 388 U.S. 293 (1967). Although the Court noted that such procedures had "been widely condemned," it upheld the admission of the identification evidence at the defendant's criminal trial. *Stovall* held that "a claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it." *Stovall*, 388 U.S. at 302. The Court found that a one-on-one identification at a hospital, where the victim was receiving medical treatment, was the only feasible procedure and that under the circumstances, "the usual police station line-up . . . was out of the question." *Id.*

The Court upheld the admission of another suggestive identification in *Simmons v. United States*, 390 U.S. 377 (1968). The Court held, "[W]e hold that each case must be considered on its own facts, and that convictions based on eye-witness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Id.* at 384. The Court found the identification procedure to be admissible, because of both the need for prompt use of other investigative leads and on the likelihood that the photographic identifications were reliable. *Id.*

The next term, in the only case before 1992 in which the Court found identification procedures to require reversal of a conviction, the Court decided *Foster v. California*, 394 U.S. 440, 442 (1969). There, the witness failed to identify Foster the first time he confronted him, despite a suggestive lineup. The police then arranged a one-on-one identification, at which the witness could make only a tentative identification. Ultimately, at yet another confrontation, this time a lineup, the witness was able to muster a definite identification. The Court held all of the identifications inadmissible, observing that the identifications were 'all but inevitable' under the circumstances. *Id.* at 443.

Despite its ruling in *Foster*, however, the Court again upheld a conviction based on a one-on-one identification in *Neil v. Biggers*, 409 U.S. 188 (1972). The Court began by noting that "suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous." *Biggers*, 409 U.S. at 198. The Court rejected the notion, however, that "unnecessary suggestiveness alone requires the exclusion of evidence." *Id.* at 198-199.

In reversing the lower courts, the Court provided a list of factors to examine whether under *Stovall's* totality of the circumstances "the identification was reliable even though the confrontation procedure was suggestive." *Id.* The factors to be considered "include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.*

The Court returned to the issue of show-ups in *Moran v. Brathwaite*, 432 U.S. 98 (1977). The question before the Court was whether the *Biggers* analysis applied to post-*Stovall* confrontations as well as to those pre-*Stovall*. The identification procedure (one photograph shown to the witness) was admitted to be both suggestive and unnecessary, since there was no emergency of exigent circumstances. *Id.* at 109. Once again, the Court rejected the argument that "out-of-court identifications should be excluded from evidence whenever it has been obtained through unnecessarily suggested confrontation procedures." *Id.* at 110. The Court held that the "per se rule goes too far." *Id.* at 112. The Court again held that "reliability is the linchpin in determining the admissibility of identification procedures" and reiterated the factors it considered in *Biggers*.

To this day, no decision of this Court has ever held that one-on-one identification procedures, even when suggestive, must always be excluded from a criminal trial. In fact, *Moran* rejected that very argument. The Court of Appeals for the Sixth Circuit summarized the state of the law at the time of the Gregory showup in holding that "[w]hile show-ups are frowned upon, they are not per se unconstitutional." *Smith v. Perini*, 723 F.2d 478, 481 (6th Cir. 1983). A police officer would have believed, then, that although a one-on-one identification may draw an objection at trial, and possible criticism from a reviewing court, the evidence of the objection would likely to be admitted at trial, and if the defendant was convicted, the conviction would likely be affirmed on appeal.

Moreover, no court before 1992 had ever held a police officer civilly liable for conducting a one-on-one identification procedure. Although the Court of Appeals defended its ruling by stating that "[t]his Court has entertained allegations of

suggestive identification procedures as viable constitutional claims. *See, e.g., Hutsell,* 5 F.3d 996 at 1005," (Opinion, at 37a). *Hutsell v. Sayre*, 5 F.3d 996 (6th Cir. 1993), actually found that the plaintiff's allegation about the identification procedure failed to state a claim. *Hutsell*, 5 F.3d at 1005-06. If Detective Tarter had relied on *Hutsell* to form his understanding of the law in this area, it would not have told him his actions constituted a constitutional violation. Even *Hutsell* would have given him no guidance, however, since it was not decided until 1993, a year after Gregory's trial.

Despite these rulings, the Court of Appeals held Detective Tarter's conduct was "clearly established" to be wrongful because "the Supreme Court has held that police officers must evaluate the totality of the circumstances and reach a reasoned conclusion as to whether an identification procedure is impermissibly suggestive or not." (Opinion, p. 36a). This requirement that a general admonition to "evaluate the totality of the circumstances" should have warned Detective Tarter not to undertake a one-on-one identification procedure conflicts with this Court's decisions requiring specificity before imposing liability in *Brousseau v. Haugen,* 543 U.S. at 197; *Saucier v. Katz*, 533 U.S. at 201, and *Anderson v. Creighton*, 483 U.S. at 640.

Moreover, the elements of the circumstances the Circuit Court ruled must be examined conflict with those listed in *Neil v. Biggers*. *Biggers* directed police officers to consider factors relating to the witness's ability to view the suspect during the crime. *Biggers,* 409 U.S. at 199-200. In this case, however, the Court of Appeals compels police officers, for the first time, to consider factors related to the identification process, including the police officer's subjective intent when arranging the identification. (Opinion, pp. 55a-

59a). The Court should grant *certiorari* to resolve the conflict.

II. The Decision Below Conflicts with Other Federal and State Decisions Which Permit Criminal Defendants to Waive Important Constitutional Rights.

The trial court admitted the evidence of the identification procedure against Gregory, at least in part, because he had waived his right to object. The Kentucky Supreme Court upheld the admission of the evidence for the same reason. The Court of Appeals held that Detective Tarter should have known what these courts did not – that such waivers would be held invalid. The decision conflicts with the Kentucky courts, and with well-established principles of federal law.

The Court has generally held that a criminal suspect may waive most constitutional rights, especially when he is represented by counsel at the time of the waiver. *Schneckloth v. Bustamone*, 412 U.S. 218, 235-237 (1973). For cases involving such issues as a defendant's consent to a search, the Court asks whether the suspect has acted "voluntarily," which "can be answered only by examining all the relevant circumstances to determine if he has been coerced." *Id.* For waivers of trial rights, the Court requires that the waiver be "knowing and intelligent." *Id.*

There are virtually no rights which cannot be waived. A defendant may waive his right to a trial, to trial by jury, or to self-incrimination. *Boykin v. Alabama,* 395 U.S. 238, 243 (1969). Indeed, the Court has suggested a suspect could even waive the presence of counsel at an identification procedure. *United States v. Wade*, 388 U.S. 218, 237 (1967).

There was no clearly established law in 1992 that could have told Detective Tarter he could not obtain a waiver of a subject's right to refuse to participate in the one-on-one identification procedure. The only cases which had decided similar issues had permitted subjects to waive the rights most essential to their defense. *See Boykin v. Alabama,* 395 U.S. at 243 (pleading guilty waives the Fifth Amendment privilege against self-incrimination, the Sixth Amendment right to confront one's accusers, and the Sixth Amendment right to trial by jury). In the context of identification procedures, the concept of waiver has been examined only regarding a defendant's waiver of a right to counsel. *United States v. Wade,* 388 U.S. at 237.

Detective Tarter's view of the issue was shared by the two Kentucky courts to consider the issue in Gregory's case. Both the trial court and the Kentucky Supreme Court permitted the introduction of this evidence, finding the waiver to be valid.

Other Circuit Courts have ruled that a right cannot be clearly established when judges in a case have disagreed, or when the officer's actions were in accordance with a regulation or policy. In *Wilson v. Jones,* 251 F.3d 1340, 1346 (11th Cir. 2001), for example, the Court of Appeals for the Eleventh Circuit held, "Inasmuch as two district judges had concluded that Sheriff Jones's policy and a similar policy were constitutional, it seems unreasonable to hold the sheriff liable for concluding the same." Similarly, in *Allen v. Coughlin*, 64 F.3d 77, 81 (2d Cir. 1995), the Court of Appeals for the Second Circuit held that inmates did have a First Amendment right of access to newspapers, but granted immunity to prison officials because the New York state appellate division had previously upheld the prison's policy: "The appellate division upheld the . . . rule . . . and we cannot say that appellees should have been more prescient in

anticipating our reaction." *See also Green v. Bauvi,* 46 F.3d 189, 195 (2d Cir. 1995) (granting immunity since "even if compliance with the state's own regulations is insufficient to meet the requirements of due process, adherence to such regulations may be pertinent in considering whether a reasonable official would have known his actions violated the Constitution"); *Gittens v. LeFevre*, 891 F.2d 38, 42-43 (2d Cir. 1989) (when United States Supreme Court case left open a "legitimate question," defendants could reasonably believe that the New York regulations complied with its standard and were entitled to immunity); *Richardson v. Selsky*, 5 F.3d 616, 623 (2d Cir. 1993) ("If the district judges in the Southern District of New York, who are charged with ascertaining and applying the law, could not determine the state of the law with reasonable certainty, it seems unwarranted to hold prison officials to a standard that was not even clear to the judges, especially since prescience on the part of prison officials is not required with respect to the future course of constitutional law").

In addition, the Court of Appeals' ruling in this case that Detective Tarter must disclose all material information before a waiver would be valid contradicts this Court's cases. The Court has never held that a police officer must disclose all relevant information to the suspect before he can make a knowing and intelligent waiver. In *Moran v. Burbine,* 425 U.S. 412 (1986), for instance, the Court ruled it was not necessary for the suspect to know that a lawyer had been retained for him and was on his way to the police station. *Id.* at 422. In *Colorado v. Spring*, 479 U.S. 564 (1987), the Court ruled that the suspect was not entitled to be told by law enforcement of all the crimes about which he may be questioned. The defendant waived his *Miranda* rights under the impression he was going to be questioned about firearm violations, while the police were actually questioning him

about a homicide. The Court stated that "this Court has never held that mere silence by law enforcement officials as to the subject matter of an interrogation is 'trickery' sufficient to invalidate a suspect's waiver of Miranda rights." *Id.* at 576. Indeed, the Court has upheld a plea agreement in which the defendant waived her right to *Brady* material. *United States v. Ruiz*, 536 U.S. 622, 633 (2002).

In other cases, the Court has required acts of affirmative misrepresentation by the police to invalidate a suspect's waiver of the Fifth Amendment privilege. *See Lynumn v. Illinois*, 372 U.S. 528 (1963) (misrepresentation by police officers that a suspect would be deprived of state financial aid for her dependent child if she failed to cooperate with authorities rendered the subsequent confession involuntary); *Spano v. New York*, 360 U.S. 315 (1959) (misrepresentation by the suspect's friend that the friend would lose his job as a police officer if the suspect failed to cooperate rendered his statement involuntary).

The conflict is more apparent because the information which Gregory alleges was wrongfully withheld from him was not material to the admissibility or reliability of the identification. Assuming Gregory's version of the facts, the information withheld was that (a) Ms. S had not identified him in the photo array, (b) her description of the rapist differed from his appearance, and (c) Detective Tarter never intended to conduct a line-up. Tellingly, none of these factors appear in the list of factors developed in *Biggers* to determine whether an identification is sufficiently reliable. In contrast, even courts in the Sixth Circuit have rejected the assertion that factors (a) and (b) render the identification procedure unreliable. In *United States v. Causey*, 834 F.2d 1277, (6th Cir. 1987), the Sixth Circuit held that "the prior failure of the witness to identify the defendant goes only to the weight to be

accorded testimony, not its admissibility." *Id.* at 1286. Further, "the fact that a witness cannot identify an accused from a photograph is no reason for excluding his testimony identifying the accused in court." *Id., quoting United States v. Toney*, 440 F.2d 590, 591 (6th Cir. 1971). Finally, the Court has many times ruled that a police officer's subjective intent is not relevant to a civil rights claim. "A defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated. Evidence concerning the defendant's subjective intent is simply irrelevant to that defense." *Crawford-El v. Britton,* 523 U.S. 574, 588 (1998). Even if, for the sake of argument, Detective Tarter never intended to conduct a lineup, that intent would not impact the reliability of the identification procedure, which is the only consideration this Court has held to be important. "The deterrence of police misconduct is not the basic purpose for excluding identification evidence . . . only the effects of, rather than the causes for, pre-identification encounters should be determinative of whether the confrontations were unduly suggestive." *Thigpen v. Cory,* 804 F.2d 893, 895 (6th Cir. 1986), citing *Biggers*, 409 U.S. at 198-199.

For these reasons, the Court should grant the writ of *certiorari* to resolve the disputes between the Sixth Circuit Court of Appeals and other courts.

III. The Decision Below Conflicts with Decisions of the Second, Third, Fifth, Seventh, Ninth, Eleventh and District of Columbia Circuits that Preclude Liability if an Intervening Decision Breaks the Chain of Causation.

Moreover, the Court of Appeal's decision in this case conflicts with the decisions of other Courts of Appeal by

holding that the mere conducting of a one-on-one identification procedure is a constitutional violation by the police officer, even when interrupted in the chain of events by a prosecutor's decision to introduce the evidence, the trial judge's decision to admit the evidence, and the appellate court's decision to affirm the trial court. The decision in this case conflicts with the decisions of the Second Circuit in *Townes v. City of New York*, 176 F.3d 138 (2d Cir.), *cert. denied,* 528 U.S. 964 (1999); of the Third Circuit in *Egervary v. Young,* 366 F.3d 238 (3d Cir. 2004), *cert. denied,* 543 U.S. 1049 (2005); of the Fifth Circuit in *Hand v. Gary*, 838 F.2d 1420 (5th Cir. 1988); of the Seventh Circuit in *Duncan v. Nelson*, 466 F.2d 939 (7th Cir.), *cert. denied,* 409 U.S. 894 (1972); of the Ninth Circuit in *Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003), *rev'd on other grounds sub nom Sosa v. Alvarez-Manchain*, 542 U.S. 692 (2004); of the Eleventh Circuit in *Barts v. Joyner,* 865 F.2d 1187 (11th Cir.), *cert. denied,* 493 U.S. 831 (1989), and of the District of Columbia Circuit in *Dellums v. Powell*, 566 F.2d 167 (D.C. Cir. 1977), *cert. denied sub nom Powell v. Dellums*, 438 U.S. 916 (1978).

No court holds that a suggestive identification procedure, without a showing of prejudice at trial, creates a constitutional violation. To the contrary, court decisions have focused on the prejudice, if any, to the defendant from the use of the identification at trial, rather than focusing solely on the overly suggestive nature of the identification procedure itself. *See, e.g., Hensley v. Carey*, 818 F.2d 646, 648 (7th Cir. 1987) ("The procedural safeguards established in *Brathwaite* and *Stovall* protect only against the admission of unreliable evidence at trial and does not establish a constitutional right to be free of suggestive lineups"); *Alexander v. City of South Bend,* 433 F.3d 550, 555 (7th Cir. 2006) (summary judgment granted against plaintiff exonerated by newly discovered DNA

evidence because he did not show injury at trial); *Pace v. City of Des Moines*, 201 F.3d 1050, 1055 (8th Cir. 2000) ("In the context of unduly suggestive lineups, only a violation of the core right – the right to a free trial – is actionable under Section 1983").

The plaintiff in a civil rights action bears the burden of proving the defendant caused this particular injury, the introduction of suggestive evidence which created an unfair trial. Usual common-law tort law rules form the basis for causation in § 1983 actions. *Hector v. Watt*, 235 F.3d 154, 160 (3d Cir. 2001). Like in other tort cases, an intervening act of a third party, which operates to produce harm after the first person's wrongful act has been committed, is a superseding cause, preventing the first person from being liable for the harm. *See* RESTATEMENT (SECOND) OF TORTS §§ 440-41 (1965).

Other circuit courts have uniformly held that the actions of a judge or prosecutor may sever the chain of causation. In *Townes v. City of New York*, 176 F.3d 138 (2d Cir.), *cert. denied*, 528 U.S. 964 (1999), for instance, a police officer made an improper warrantless search of a taxi in which Townes was riding. At trial, the judge refused to suppress the evidence, and Townes was convicted. In the later § 1983 action, the Second Circuit Court of Appeals ruled that Townes could not collect against the officer making the search, holding that the trial court's failure to suppress the evidence constituted a superseding cause of Townes' conviction and imprisonment. *Id.* at 147.

The Eleventh Circuit reached the same conclusion in *Barts v. Joyner*, 865 F.2d 1187 (11th Cir.), *cert. denied*, 493 U.S. 831 (1989). The decisions to prosecute, indict, convict, and sentence do not fall within the realm of the police officer, the

Court held. *Id.* at 1196-1197. Consequently, a police officer may not be held liable for others' decisions. Finding otherwise, the Court held, "trivializes the importance of these post-arrest decisions, which do not merely pass on the correctness of the seizure or arrest by police but which . . . determine the likelihood that a potential defendant is guilty of violating the law." *Id.*

So long as the trial court is not deceived, the *Barts* court held, its ruling will break the causation chain. *Id.* The Fifth Circuit and District of Columbia Court of Appeals have followed the same path. *See Hand v. Gary*, 838 F.2d 1420, 1428 (5th Cir. 1988) ("An independent intermediary breaks the chain of causation unless it can be shown that the deliberations of that intermediary were in some way tainted by the actions of the defendant"); *Dellums v. Powell*, 566 F.2d 167, 192-193 (D.C. Cir. 1977), *cert. denied sub nom. Sosa v. Alvarez* (finding the chain of causation to be broken if the prosecutor's decision to charge was independent of improper influence or misstatements).

In this case, there can be no suggestion that the trial court and Kentucky Supreme Court were deceived. At trial, and on appeal, both courts were aware that Ms. S had not identified Gregory in the photopack review. Indeed, the Kentucky Supreme Court rejected the idea that this information was relevant to Gregory's waiver, finding that this Court's decision in *Moran v. Burbine,* 475 U.S. at 422 (1986) did "not require that the defendant be given all of the information that might be useful in making a decision to waive his rights. . . . ." (Kentucky Supreme Court Opinion, pp. 111a-112a).

The Ninth Circuit Court of Appeals has also differed from the approach taken in the decision below. In *Alvarez-Machain v. United States,* 331 F.3d 604 (9th Cir. 2003), *rev'd*

on other grounds sub nom Sosa v. Alvarez-Machain, 542 U.S. 692 (2004), the plaintiff brought a civil rights claim against federal agents who kidnapped him in Mexico and brought him to stand trial in the United States. The Court of Appeals held that any damages would be limited to the time before the plaintiff was brought before a court, before the "initial act of misconduct of one actor [were] broken by the acts of a third party." *Id.* at 636. Similarly, the Seventh Circuit Court of Appeals held that police officers could not be held liable for injuries related to an improper conviction and incarceration stemming from a coerced confession. *Duncan v. Nelson*, 466 F.2d 939, 942 (7th Cir.), *cert. denied*, 409 U.S. 894 (1972). Since the defendants are presumed to have known the law concerning involuntary confessions, the Court reasoned, they must be assumed to have known the trial judge would suppress the evidence. "To find that these defendants, who knew or should have known this confession was inadmissible, would foresee that the trial judge would erroneously admit this unlawful confession is untenable." *Id.*

Likewise, in *Egervary v. Young,* 366 F.3d 238 (3d Cir. 2004), *cert. denied*, 543 U.S. 1049 (2005), the Third Circuit Court of Appeals ruled that a plaintiff could not collect against an attorney and State Department officials who caused a judge to take custody of his child without granting him a hearing. *Id.* at 246. After reviewing opinions from other circuits, the Court of Appeals held that the judge's decision, though wrong, the error "must be held to be a superseding cause, breaking the chain of causation for purposes of § 1983 and *Bivens* liability. *Id.* at 251.

The courts reaching this conclusion have recognized the identification procedure alone cannot cause constitutional injury. It is only an improper admission of the evidence at trial, in a manner which affects the trial's outcome, which

violates the plaintiff's due process rights. If the evidence were excluded at trial, there would be no due process violation.

However, the Sixth Circuit held, relying on this Court's decisions in *Monroe v. Pape,* 365 U.S. 167, 187 (1961) and *Malley v. Briggs,* 475 U.S. 335, 345 (1986), that Detective Tarter could be held liable for the admission of this evidence because it was "the natural consequences of his actions." (Opinion, p. 38a). Other circuits have rejected this interpretation of *Malley* and *Monroe.* In *Egervary,* for example, the Third Circuit Court of Appeals held that the "cryptic reference to the common law in *Malley's* footnote 7" was *dictum,* or at least to be limited to cases in which the defendant deceived the judge. *Egervary,* 366 F.3d at 247-248. Similarly, the Eleventh Circuit Court of Appeals held in *Barts* that *Malley* must be limited to its facts on this issue. "*Malley* never considered the question of whether, once an arrest has incorrectly occurred, later independent decisions of prosecutors, juries and judges to prosecute, indict, convict, and sentence would break the chain of causation for damages that might relate to the original unlawful seizure. But we believe that these independent acts must break the causal connection. . . ." *Barts v. Joyner,* 865 F.2d at 1196.

The Sixth Circuit, then, stands alone in rejecting the common law view of superseding cause in a § 1983 case. The Court should grant the writ to resolve the conflict.

Conclusion

For all of the foregoing reasons, the Petitioner respectfully requests that the petition for writ of *certiorari* be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 04-5856/5859/6482

[Filed August 1, 2006]

WILLIAM THOMAS GREGORY,
Plaintiff-Appellee/Cross-Appellant (04-6482),

v.

CITY OF LOUISVILLE, ET AL.,
Defendants/Cross-Appellees (04-6482),

DAWN ROSS KATZ,
Defendant-Appellant (04-5856)/Cross-Appellee,

JOE CARROLL, ET AL,
Defendants-Appellants (04-5859)/Cross-Appellees,

JOHN VANCE, ET AL.,
Defendants.

BEFORE: SILER and CLAY, Circuit Judges; and MILLS,* District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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* Hon. Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 04-5856/5859/6482

[Filed April 11, 2006]

WILLIAM THOMAS GREGORY,
Plaintiff-Appellee/Cross-Appellant (04-6482),

v.

CITY OF LOUISVILLE; LOUISVILLE DIVISION OF POLICE; HOPE GREER; DARRELL AMMON; WAYNE KESSINGER; JAY PIERCE; EUGENE SHERRARD; LUANNE THOMAS,
Defendants-Cross-Appellees (04-6482),

DAWN ROSS KATZ,
Defendant-Appellant (04-5856)/ Cross-Appellee,

JOE CARROLL; STEVE CLARK; JOHN TARTER,
Defendants-Appellants (04-5859)/Cross-Appellees,

JOHN VANCE, et al.,
Defendants.

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 01-00535 — Thomas B. Russell, District Judge.

Before: SILER and CLAY, Circuit Judges; MILLS, District Judge.* CLAY, J., delivered the opinion of the court, in which MILLS, D. J., joined. SILER, J. delivered a separate opinion concurring in part and dissenting in part.

OPINION

CLAY, Circuit Judge. Plaintiff, William Thomas Gregory, and Defendants cross appeal March 29, 2004 and June 22, 2004 orders entered by the United States District Court for the Western District of Kentucky which ruled on the parties' cross-motions for summary judgment in this action by Plaintiff for violations of his civil rights under 42 U.S.C. § 1983 and various state laws. The orders below dismissed Plaintiff's claims entirely against the municipal and supervisory Defendants, denied other Defendants absolute or qualified immunity, and dismissed certain claims as unsupported by the record.

For the reasons set forth below, this Court **AFFIRMS** in part and **REVERSES** in part the orders of the district court.

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* The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

I

BACKGROUND

The series of events underlying this action surround Plaintiff's arrest and 1993 conviction on charges of rape, attempted rape, and burglary. Plaintiff's conviction was vacated in 2000 after DNA tests established that the sole physical evidence linking Plaintiff to either of the crime scenes - several hairs - could not have come from Plaintiff. All charges against Plaintiff were dismissed on August 25, 2000, after Plaintiff had spent more than seven years in custody.

A. SUBSTANTIVE FACTS

1. The Assaults on Mrs. V and Ms. S

Plaintiff's conviction stems from assaults on two women who lived in the same apartment complex as Plaintiff. The first of these two assaults occurred on June 1, 1992, when "Mrs. V," a white woman, was awakened by an unknown, nude, black male standing over her bed. This intruder, who wore a pair of the victim's pantyhose as a mask, struggled with the victim, choked her, fondled her breasts, and attempted to rape her. Mrs. V reports that she fought off her attacker, managed to pull off the pantyhose, and scratched the attacker's face before he fled her apartment. Mrs. V. described her assailant as a black male, 30-40 years old, 5 feet 6 inches tall, with a stocky build and long, straight, oily or greasy hair. Mrs. V also informed the police that her attacker had a very small, circumcised penis and had attempted to use a lubricant, which the police later determined was Vaseline. The police later discovered that the attacker had disabled three

telephones and stolen a television and a compact disc player from the apartment.

Mrs. V's neighbors and mother, all white, saw her immediately after the attack. When Mrs. V gave the police a description of her attacker, the neighbors and her mother informed the police that they thought the description matched that of Plaintiff.

Later in the day on June 1, 1992, Mrs. V saw Plaintiff in the apartment complex, and police were called to the area. Several officers of the Louisville Division of Police ("LDP") went to Plaintiff's apartment, told Plaintiff that they were investigating an incident unrelated to Mrs. V's assault, and were allowed to search Plaintiff's apartment. Police found no evidence linking Plaintiff to the assault, either in the apartment or on Plaintiff's person (such as marks or injuries).

Two days later, Clark and Carroll, LDP officers, showed Mrs. V a photopak that included Plaintiff's picture. Mrs. V initially made no identification, but when asked to pick a photo which resembled her attacker, Mrs. V chose a photo other than Plaintiff's. When Mrs. V's mother looked through the photopak she identified Plaintiff as living in the same apartment complex.

Later on the same day that Mrs. V had reviewed the photopak, Mrs. V's mother called police to tell them that Mrs. V had seen Plaintiff at the apartment complex and was now sure that he was her assailant. With the assistance of Clark and Carroll, Mrs. V swore out a criminal complaint, pursuant to which Clark and Carroll obtained a warrant for Plaintiff's arrest.

At a preliminary hearing on June 15, 2002, Clark testified on direct examination that Mrs. V had twice identified Plaintiff. Clark was presumably referring to Mrs. V's two sightings of Plaintiff at the apartment complex, once prior to Mrs. V's failure to pick Plaintiff out of a photopak, and once after the photopak procedure. On cross-examination Clark revealed that Mrs. V had failed to pick Plaintiff out of a photopak, but did not reveal that Mrs. V actually picked another photo. When asked if the police had any evidence against Plaintiff other that Mrs. V's identification, Clark responded "Not at this time." (J.A. at 1301.) When asked if Mrs. V had given a physical description of her assailant, Clark responded: "That's correct and it fits [Plaintiff]." (J.A. at 1301.) When Plaintiff moved to dismiss for lack of probable cause, the judge denied the motion, but noted that "because of the extremely minimal burden on the Commonwealth I'm gonna have to find probable cause but I'll state for the record it's just barely." (J.A. at 1302.) Plaintiff was released on bail.

According to the testimony of Clark and Carroll at Plaintiff's criminal trial, following Plaintiff's arrest, Plaintiff made a telephone call to a friend and told the friend about the items stolen from Mrs. V's apartment. Plaintiff claims that, prior to the telephone call, Carroll and Clark told him what had been stolen from the apartment; Carroll and Clark, however, deny that they ever told Plaintiff what had been stolen. Carroll and Clark recorded the overheard telephone conversation in their contemporaneous investigative notes.

In July 1992, Dawn Katz, in her role as Examiner with the Kentucky State Police Crime Laboratory, examined hairs found in the pantyhose Mrs. V's attacker had been wearing as a mask. Katz compared these hairs to samples taken from Plaintiff. In her laboratory notes, Katz records the hairs found

in the pantyhose as "# NH & 1 CH." (J.A. at 557.) The notes appear as if the number preceding the "NH" (for negroid hairs) had been scratched out ("CH" stands for caucasoid hair). Katz's notes further record that "5 HHs" (head hairs) were similar to Plaintiff's hair, and later reports that Plaintiff's head hair standard was similar in color and microscopic characteristics with the Negroid hairs recovered from the pantyhose. No mention is made anywhere in Katz's notes of additional negroid hairs found on the pantyhose. Katz's deposition for this instant action revealed that Katz had actually found 7 negroid head hairs on the pantyhose, only 5 of which she found similar to Plaintiff's hair. Katz testified in the deposition that before she sent the slide with the hairs to the Innocence Project in 1996, Katz checked to insure there were still 7 hairs on the slide because she remembered that there had been seven hairs taken from the pantyhose. Katz testified that she was not and still is not in the habit of recording dissimilarities.

While Plaintiff was out on bail, a second assault occurred in the same apartment complex on July 19, 1992, on a 71 year old white woman, "Ms. S." Ms. S awoke to a nude, black male in her apartment. Armed with a kitchen bread knife, the man raped Ms. S with the aid of hand lotion as a lubricant, french-kissed her, and stole items before leaving. Police also discovered that the intruder had drank from several items of liquor in Ms. S's apartment. A sexual assault kit from Ms. S, processed by Katz, contained no secretions or other pertinent evidence.

Ms. S described her attacker as a black male, late 20s to mid 30s, with a slender to small build, short black and curly hair, with a round, clean-shaven face. Mrs. S also indicated the attacker felt very greasy around the neck and shoulders.

Defendants Tarter and Greer, LDP officers, investigated the attack on Ms. S. Tarter and Greer visited Ms. S with a photopak that included Plaintiff's picture and five others. Only Plaintiff's photo had a recent date on it ("06:03:92"), but Ms. S was unable to make any identification from the photopak. Thereafter, Tarter and Greer asked Plaintiff to come in for a line-up in the presence of Ms. S. By the time Plaintiff and his attorney arrived at the station, Tarter had taken no affirmative steps, beyond securing the presence of Ms. S, to effectuate a line-up. Line-ups take at least an hour to arrange and can take days if the suspect has unique characteristics. Neither Tarter nor Greer informed Plaintiff, Plaintiff's counsel, LDP supervisory staff, or the prosecutor that Ms. S had failed to pick Plaintiff's picture out of a photopak or that Ms. S's description of her assailant was inconsistent with Plaintiff's physical appearance.

After Plaintiff arrived at the station anticipating a line-up, Tarter instead asked Plaintiff to agree to a one-on-one show-up with Ms. S. Plaintiff agreed and signed a preprinted "waiver" form consenting to the show-up.[1] At the one-on-

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[1] The "waiver" form read:

> I, William Thomas Gregory, hereby waive my right and privilege to stand in a line-up for a possible identification concerning crimes or offenses for which I am a suspect. I hereby agree to stand in a one-on-one system of identification before witnesses or victims of crimes or offenses of which I am a suspect for purposes of identification. I have not been threatened or promised anything by any officers or detectives of the Louisville Division of Police to persuade me to sign this form freely and voluntarily. I am fully aware of the nature of this process and realise [sic] the consequences of an

one show-up, after viewing Plaintiff for several moments, Ms. S requested to have Plaintiff repeat the words uttered by her rapist. Tarter asked Plaintiff to repeat, "Don't scream. I have a 14 year old daughter." (J.A. at 1887-88.) Ms. S told the police that Plaintiff was her attacker based upon his eyes. Ms. S later said at trial that "I think I said I thought they were kinda grey." (J.A. at 1747.) Plaintiff's criminal counsel was never informed of this statement by Ms. S. The police arrested Plaintiff immediately following Ms. S's identification.

Plaintiff is a 5 foot, 11 ½ inches tall black man with brown eyes. At the time of his arrest, Plaintiff was 44 years old, had a potbelly, and wore a full beard. Plaintiff had worn the beard continually for 10 years. Plaintiff additionally has an average-sized penis, measuring 5 ½ inches in the flaccid state.

Tarter later testified that he believed that if he had told Plaintiff and Plaintiff's counsel that Ms. S had failed to pick Plaintiff out of a photopak, Plaintiff would not have agreed to the one-on-one show-up.

2. The Assault on Ms. B

On August 14, 1992, while Plaintiff was jailed for the Ms. S assault, a third woman was sexually assaulted not far from the apartment complex where the first two assaults occurred. The white victim, "Ms. B," awoke to find a nude black male

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identification and intelligently waive my right to a police line-up.

(J.A. at 2007.)

standing above her and holding a knife. The attacker beat her, used lubricant (hand lotion) in a sexual assault, used distinctive language, drank liquor, and stole electronics. Ms. B reported her assailant as being a black male about 5 feet, 8 inches tall, muscular build, short hair, aged about 30 to 35, with a thin mustache. In a subsequent photopak array which included Plaintiff's photo, Ms. B was unable to identify her assailant.

A copy of the composite drawing created from Ms. B's description of her assailant was placed in the LDP police files for the Mrs. V and Ms. S assaults. When Plaintiff's counsel remarked upon the poster in front of Tarter, Tarter replied, "that's been misfiled; that's not supposed to be in that file; that doesn't have anything to do with [the case about Mrs. V and Ms. S]." (J.A. at 2009).

3. The Assault on Ms. R

On June 28, 1993, about one month before Plaintiff's trial on the Mrs. V and Ms. S assaults and while Plaintiff was in state custody, a fourth assault took place that was similar to those assaults on Mrs. V, Ms. S, and Ms. B. A white, female victim ("Ms. R") awoke to find a black male, nude from the waist down, on top of her and armed with a knife. The attacker used a lubricant in a sexual assault on Ms. R, drank liquor, and stole Ms. R's belongings (but not electronics). Ms. R described her assailant as a black male, aged 35-40, 5 feet, 9 inches tall, skinny, and with a small penis.

Tarter was one of the officers involved in the investigation of Ms. R's assault. Tarter was present when Ms. R described her assailant and the events surrounding the assault. A suspect was arrested in the Ms. R assault following a positive photopak identification. No evidence indicates that Tarter or

anyone in the LDP took measures to explore whether Ms. R's assault was connected to the assaults on Mrs. V and Ms. S.

4. Grand Jury Proceedings

At the December 4, 1992 grand jury hearing for the assault on Mrs. V, Clark testified to the two identifications made by Mrs. V but did not mention Mrs. V's inability to pick Plaintiff's photo from the photopak, the inconsistency between Mrs. V's initial description and Plaintiff's physical appearance, or that two more assaults with similar characteristics had taken place since Plaintiff had been in jail.

At the August 14, 1992 grand jury for the assault on Ms. S, Tarter testified to Ms. S's identification and the similarities between the Mrs. V and Ms. S assaults, but did not mention Ms. S's inability to pick Plaintiff's photograph from the photopak, the inconsistency between Ms. S's initial description and Plaintiff's appearance, or that two more assaults with similar characteristics had taken place since Plaintiff had been in jail.

5. Plaintiff's Trial for the Assaults on Mrs. V and Ms. S

A joint trial for the Mrs. V and Ms. S assaults began on August 10, 1993. For the assault on Mrs. V, prosecutors presented an in-court identification by Mrs. V, testimony from Clark and Carroll about Plaintiff's knowledge of the stolen items from Mrs. V's apartment, and Katz's testimony about the hairs. Katz's testimony went as follows:

Q. Do you know approximately how many hairs you found in [the pantyhose]?

A. I found five hairs.

. . . .

Q. Could you please explain . . . your findings as a result of the comparison of the hairs from the pantyhose and the hairs from the defendant?

A. Well, I determined that the hairs I found in the pantyhose were similar in color, microscopic characteristics from the head hair standard from [Plaintiff].

Q. That is a term that you all use when you make a match, that they are similar?

R. POLK: Objection, Judge.

MR. SCHOERING: That is fine.

Q. Ma'am, what does that mean?

A. That means that I have - I have looked at the standard, the head hair standard I'm given first and I have written down a range of characteristics on a worksheet that I have . . . .

. . . .

Q. Ma'am, do most African-American hairs that you have examined have medullas?

A. Well, it seems to be a pretty common characteristic in the negroid race. As a matter of

fact, they usually have a very prominent medulla . . . .

Q. And did the samples taken from the pantyhose have a medulla?

A. These hairs had no medulla. That was one of the characteristics they were lacking.

Q. Did the samples that you obtained from [Plaintiff] have a medulla?

A. No, they did not.

(J.A. at 2460-63.)

The evidence in Ms. S's case was largely derivative of the evidence against Plaintiff for the assault on Mrs. V. Prosecutors relied on Ms. S's show-up identification and the similarities between the two crimes. No other evidence placed Plaintiff at the scene of the assault on Ms. S. Plaintiff's roommate testified that Plaintiff had been in their apartment with him at the time of the assault on Ms. S.

At trial, Plaintiff's attorney argued that the third crime against Ms. B pointed to a different perpetrator for all three crimes. Plaintiff's attorney was unable to point to significant additional evidence supporting the alternate perpetrator theory, however, because Plaintiff's attorney had no knowledge of the fourth assault.

The trial judge held that Plaintiff had waived the right to contest Ms. S's identification because of Plaintiff's consent to the one-on-one show-up. The court noted that "[w]e all agree that the [show-up] procedure would have been unduly

suggestive had there not been a waiver . . . . There would have been serious problems with it." (J.A. at 1906-07.)

The jury found Plaintiff guilty of all charges. In October 1993 the court sentenced Plaintiff to a total of 70 years incarceration.

6. Plaintiff's Exoneration

DNA testing in 1999 and 2000 revealed that none of the hairs recovered from the pantyhose came from Plaintiff. All charges against Plaintiff were dismissed on August 25, 2000, after Plaintiff had spent more than seven years in custody.

B. PROCEDURAL HISTORY

On August 24, 2001, Plaintiff brought the instant action in the Circuit Court of Jefferson County, Kentucky, claiming numerous violations of his civil rights under 42 U.S.C. § 1983 and various state laws by the investigatory teams involved in his 1993 criminal conviction. In his initial complaint Plaintiff named the City of Louisville (the "City") and the Louisville Division of Police ("LDP") as governmental Defendants. Plaintiff further named local officials in their official and individual capacities: Joe Carroll ("Carroll"), a police officer/detective with LDP; Steve Clark ("Clark"), a police officer/detective with LDP; Hope Greer ("Greer"), a police officer/detective with LDP; John Tarter ("Tarter"), a police officer/detective with LDP; and unknown defendants Jane/John Does, supervisors and/or policymakers associated with the City and/or LDP. Finally, Plaintiff named state employees Dawn Ross Katz ("Katz"), a Kentucky State Police Crime Laboratory Examiner, and unknown defendants Jane/John Does, supervisors, employees, or policymakers

associated with the Kentucky State Police Crime Laboratory, all in their individual capacities.

Defendants removed this case to the United States District Court for the Western District of Kentucky on September 17, 2001. Shortly thereafter, on October 19, 2001, Plaintiff requested a "Warning Order" to be able to serve his unnamed defendants, pursuant to Kentucky Rules of Civil Procedure 4.05, which provides:

> If a party sought to be summoned is . . . (e) an individual whose name or place of residence is unknown to the plaintiff the clerk shall forthwith, subject to the provisions of Rule 4.06, make an order upon the complaint warning the party to appear and defend . . . .

Kent. R. Civ. P. 4.05. Warning Order counsel was unsuccessful, however, and reported back to the district court without having served the substitute real Defendants.

Plaintiff asked for leave to file a Second Amended Complaint in order to name his Jane and John Doe defendants on February 28, 2002, which the court granted on April 12, 2002. In his Second Amended Complaint Plaintiff named, in their individual and official capacities, the following individual Defendants of the LDP in lieu of his previously unnamed defendants: Darrell Ammon ("Ammon"), a Detective Sergeant with supervisory authority over Carroll and Clark; Wayne Kessinger ("Kessinger"), a police officer/detective with supervisory authority over Carroll and Clark; Jay Pierce ("Pierce"), a police officer/detective with supervisory authority over Tarter and Greer; and Eugene Sherrard ("Sherrard"), a police officer/detective with supervisory authority over Tarter and Greer. In addition,

Plaintiff named, in their individual capacities, the following individual Defendants of the Kentucky State Police in lieu of his previously unnamed defendants: Luanne Thomas ("Thomas"), Katz's immediate supervisor; John Vance ("Vance"); L.E. Burgin ("Burgin"); and Roy Sturgill ("Sturgill"). Finally, Plaintiff named Billy G. Wellman ("Wellman"), the Commissioner of the Kentucky State Police, in his individual and policymaking capacities.

Plaintiff alleged eleven counts in all, many against multiple Defendants. Plaintiff prayed for compensatory monetary damages, punitive damages, and costs. Plaintiff also requested a jury trial.

Plaintiff and Defendants filed cross-motions for summary judgement in late 2003. The district court issued its ruling on those motions on March 29, 2004, making various findings of absolute or qualified immunity and the existence of genuine issues of material fact. The order resulted in a dismissal of all claims against all Defendants, with the exception of several claims against Tarter and Katz. The March 29, 2004 order left for a jury trial the following claims: 1) claims against Katz for *Brady* violations arising from the hair examination and failure to disclose the results, 2) claims against Tarter based on a suggestive line-up, malicious prosecution, and false arrest/imprisonment under federal and state law, and 3) claims against Tarter for *Brady* violations for failing to disclose a fourth, similar rape which took place while Plaintiff was in custody.

Plaintiff and remaining Defendants filed Motions for Reconsideration, which the district court granted in part, finding that its earlier ruling finding absolute immunity for Defendants Clark, Carroll, and Katz for their pretrial acts was legal error. The district court therefore reinstated the

following claims on June 21, 2004: 4) claims against Katz for fabrication of evidence and 5) claims against Carroll and Clark for fabrication of evidence.

Katz filed an interlocutory appeal on July 7, 2004 under this Court's exception to the final order doctrine for purposes of appealing the district court's denial of absolute and qualified immunity. Tarter, Carroll, and Clark filed also filed interlocutory appeals for the same purpose on July 7, 2004. Upon request by Plaintiff, the district court issued a Final Judgment Order on October 8, 2004 and certified for appeal under Rule 54(b) the federal claims on which the district court had issued summary judgment for Defendants. Accordingly, Plaintiff filed his Notice of Appeal on October 21, 2004.

Defendants Katz, Tarter, Carroll, and Clark argue that the district court should have found their actions shielded by absolute or qualified immunity.

Plaintiff alleged in his notice of appeal that the district court improperly dismissed his supervisory liability claims against Ammon, Kessinger, Pierce, Sherrard, and Thomas; his suit against the City; his malicious prosecution claims against Katz, Carroll, and Clark; his *Brady* claims against Carroll and Clark; his conspiracy claims against Tarter, Carroll, and Clark; and his failure to investigate claim against Tarter. Plaintiff does not argue in briefs to this Court, however, his *Brady* claims against Carroll and Clark, his conspiracy claims, nor his failure to investigate claim against Tarter. Additionally, Plaintiff does not argue in briefs to this Court that the district court erred in granting summary judgment to supervisory Defendants Pierce and Sherrard. Issues not argued on appeal are deemed waived for appellate review. *See Kocsis v. Multi-Care Mgmt.*, 97 F.3d 876, 881

(6th Cir. 1996). We therefore address the remaining claims in this opinion.

II

DISCUSSION

A. ABSOLUTE IMMUNITY

Whether absolute immunity protects a defendant from liability under 42 U.S.C. § 1983 is a legal question that this Court reviews *de novo*. *Spurlock v. Satterfield*, 167 F.3d 995, 1000 (6th. Cir. 1999).

1. Absolute Immunity Does Not Extend to Pretrial Acts

Plaintiff alleges that Defendants Carroll and Clark fabricated notes stating that they did not tell Plaintiff what was stolen from Mrs. V's apartment. Rather, Plaintiff alleges that Clark and Carroll told him what had been stolen. Similarly, Plaintiff alleges that Defendant Katz fabricated evidence when she construed and documented Plaintiff's hairs as a "match" to those found at the crime scene. Carroll, Clark, and Katz do not dispute that, if true, Plaintiff's allegations show a violation of Plaintiff's constitutional rights. It is well established that a person's constitutional rights are violated when evidence is knowingly fabricated and a reasonable likelihood exists that the false evidence would have affected the decision of the jury. *Stemler v. Florence*, 126 F.3d 856, 872 (6th Cir. 1997). Instead, Carroll, Clark, and Katz argue that their pretrial acts are inextricably linked to their testimony at trial and therefore cannot be the basis of liability under the doctrine of absolute immunity. While Plaintiff agrees that Defendants' trial testimony cannot serve as the

basis for his suit, Plaintiff argues that Defendants' trial testimony does not "relate back" to immunize pretrial acts which of themselves do not merit absolute immunity.

Title 42, Section 1983 of the United States Code creates civil liability for public officials who violate a person's constitutional rights while acting under color of law.[2] The Supreme Court, however, has recognized two kinds of immunity which shield some official actions from liability which might otherwise arise under § 1983. The most common type of immunity is qualified immunity, which protects officials from liability when a reasonable official in the defendant's position would not have understood his or her actions to violate a person's constitutional rights. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Defendants' assertions of qualified immunity are the subject of Part II.B of this opinion, *infra*. More limited in application, but certainly broader in protection, is absolute immunity, which the Supreme Court has held applies to the performance of certain functions when those functions are integral to the functioning of our adversarial judicial system. *See Briscoe v. LaHue*, 460 U.S. 325, 345, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983). The Supreme Court has carefully circumscribed the doctrine, however, because

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[2] 42 U.S.C. § 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

absolute immunity protects an official from liability even when the official acted with knowledge of the constitutional violation. *Id.* Testimony at adversarial judicial proceedings is the most historically grounded of these functions which merit absolute immunity. *See id.*

In circumscribing the doctrine, the Supreme Court has advanced the interest served by absolute immunity - the furtherance of our adversarial legal system - by employing a functional test: "The official seeking absolute immunity bears the burden of showing that such immunity is justified for the function in question." *Buckley v. Fitzsimmons*, 509 U.S. 259, 269, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993). Those functions more "intimately associated with the judicial phase of the criminal process" are more likely to merit careful consideration for absolute immunity. *Id.* In contrast, those functions more "investigative" in nature - searching for "clues and corroboration" - are more removed from the judicial process and merit only qualified immunity. *Id.* at 273. The Supreme Court's decision in *Buckley v. Fitzsimmons* refused to extend absolute immunity to prosecutors accused of fabricating expert evidence when the prosecutors were acting in an investigatory fashion rather than as advocates. *Id.* at 275.

Following the Supreme Court's direction, this Circuit therefore looks to the "nature of the function performed" in evaluating whether to extend absolute immunity. *See id.* at 269. This Circuit, like most of our sister circuit courts of appeals, has held that absolute testimonial immunity does not "relate backwards" to "protect [a defendant] for any activities he allegedly engaged in prior to taking the witness stand for his [] testimony." *Mastroianni v. Bowers*, 160 F.3d 671, 677 (11th Cir. 1998) (denying defendant's motions for summary judgment based on absolute and qualified immunity); *accord*

Spurlock, 167 F.3d at 1001. Subsequent testimony can not insulate previous fabrications of evidence merely because the testimony relies on that fabricated evidence. *Id.* This Court has never endorsed such a self-serving result. Merely because a state actor compounds a constitutional wrong with another wrong which benefits from immunity is no reason to insulate the first constitutional wrong from actions for redress.

This Court has consistently held that nontestimonial, pretrial acts do not benefit from absolute immunity, despite any connection these acts might have to later testimony. As early as 1987 this Court noted in *Alioto v. City of Shively* that the doctrine of absolute immunity would not protect an official accused of falsifying evidence or even conspiring to falsify evidence. 835 F.2d 1173, 1174 (6th Cir. 1987). More than a decade after the *Alioto* case, the *Spurlock* panel found that efforts to persuade a third-party witness to lie were non-testimonial acts, regardless of the acts' connection to the third-party witness' later testimony. 167 F.3d at 1002. The *Spurlock* case is particularly instructive, both because it establishes the law in this Circuit on the extent of absolute immunity, and because the facts alleged in the instant case and the facts alleged by the *Spurlock* plaintiffs are strikingly similar.

The *Spurlock* plaintiffs had brought a § 1983 action against defendant police officers and prosecutors after the plaintiffs' wrongful conviction of first degree murder.[3] According to the plaintiffs' complaint, the defendants procured false testimony and manufactured other evidence

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[3] The plaintiffs had alleged various violations of constitutional rights, including the First, Fourth, Sixth, and Fourteenth Amendments.

against plaintiffs. *Id.* at 1002. After a grand jury indicted plaintiffs in part on the basis of this false evidence, plaintiffs were tried and convicted of first degree murder, again on the basis, in part, of this falsified evidence. *Id.* at 999-1000. After plaintiffs were subsequently exonerated for the crime, they pursued the § 1983 action.

This Court heard the *Spurlock* case as an interlocutory appeal from a denial of absolute and qualified immunity for one of the defendant police officers. *Id.* at 997. Like Defendants in the instant case, the *Spurlock* defendant argued that his actions to procure the false testimony of a later trial witness merited absolute immunity because they were inextricably linked to that later testimony and the defendant's own testimony at trial. This Court rejected that argument, noting that "[t]he simple fact that acts may ultimately lead to witness testimony does not serve to cloak these actions with absolute testimonial immunity." *Id.* at 1001. This Court further found that "by virtue of being a witness, [the defendant] is not entitled to absolute immunity in performing any nontestimonial or pre/post-trial acts. What plaintiffs, in essence, allege here is the fabrication of probable cause, and contrary to [the defendant's] arguments, the fabrication of probable cause cannot be immunized by later providing false testimony." *Id.* at 1004.

This Circuit has since ruled consistently with the holding in *Spurlock*. This Court later found in *Hinchman v. Moore* that a municipal officer's verbal fabrications as told to a state trooper and to prosecutors were not entitled to absolute immunity, despite the officer's consistent testimony with these fabrications at the plaintiff's later criminal proceedings. *See Hinchman v. Moore*, 312 F.3d 198, 205 (6th Cir. 2002). We find Defendants' arguments indistinguishable from those put

forth by the unsuccessful defendant in *Spurlock*. *See* Part II.A.2, *infra*.

2. Katz's Pretrial, Nontestimonial Acts

"Expert" forensic examiners act in an investigatory fashion when they interpret and document physical evidence. Under the Supreme Court's functional test, the pre-trial investigatory acts by forensic examiners merit no more protection under absolute immunity than do other persons performing investigatory actions. This Court sees no reason to treat the intentional fabrication of a forensic report differently from the intentional fabrication of a police officer or prosecutor. The Ninth Circuit has noted that absolute immunity "does not shield non-testimonial conduct . . . . [P]olice officers . . . obviously enjoy no immunity for non-testimonial acts such as fabricating evidence." *Paine v. City of Lompoc*, 265 F.3d 975, 981 (9th Cir. 2001) (internal quotations and citations omitted). More specifically, the Fifth Circuit has declined to extend absolute immunity to a forensic examiner who allegedly falsified a forensic report. *See Keko v. Hingle*, 318 F.3d 639, 644 (5th Cir. 2003). In a case with facts very similar to the case at bar, the Tenth Circuit held that an action could proceed against a forensic hair examiner accused of falsifying her investigative report and recording a "match" when one did not exist. *See Pierce v. Gilchrist*, 359 F.3d 1279, 1300 (10th Cir. 2004) (upholding district court's denial of qualified immunity to the forensic examiner on a motion to dismiss).[4]

Katz argues that this Court should hold *Spurlock* inapplicable to actions by expert witnesses who become

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[4] The *Pierce* defendant did not assert absolute immunity.

involved in a case after probable cause is established. Rather, Katz would have this Court apply the Seventh Circuit test, which Katz contends provides absolute immunity for pre-trial preparatory activities by experts. *See Buckley v. Fitzsimmons*, 919 F.2d 1230 (7th Cir. 1990), *overruled on other grounds by* 509 U.S. at 269. Katz also argues that her actions did not create probable cause for Plaintiff's arrest and therefore should benefit from absolute immunity.

We find Katz's arguments in conflict with the precedent of this Circuit. This panel is bound by the rule of law set forth in *Spurlock*, as a published opinion of this Court. *See* 6th Cir. Local R. 6. *Spurlock* clearly held that the fabrication of evidence is a pretrial, nontestimonial act which does not merit absolute immunity. 167 F.3d at 1002. Moreover, this Court finds that Katz's proposed use of probable cause as some sort of demarcation line is inconsistent with the rationale for absolute immunity and the Supreme Court's direction in *Buckley*. *See Buckley*, 509 U.S. at 269. The *Buckley* Court dismissed the argument that probable cause was a dividing line for potential liability attendant to prosecutors' actions. The *Buckley* Court noted that its approach

> focuses on the conduct for which immunity is claimed, not on the harm that the conduct may have caused or the question whether it was lawful. The location of the injury may be relevant to the question whether a complaint has adequately stated a cause of action for damages . . . . It is irrelevant, however, to the question whether the conduct of a prosecutor is protected by absolute immunity.

Id. at 271-72. The Supreme Court went on to note that "a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions

taken afterward." *Id.* at 274. After judges themselves, prosecutors have historically enjoyed the broadest range of absolute immunity for their actions in the course of criminal prosecutions - broader indeed than that granted police officers or testifying witnesses. It would be incongruous for this Court to grant a forensic examiner greater protection for her investigatory acts than the Supreme Court has seen fit to grant to prosecutors for the same.

Finally, we note that Katz's report exists independently of her subsequent testimony. The report is a piece of documentary evidence upon which Plaintiff argues that the prosecutors justifiably relied to continue their prosecution of Plaintiff. Moreover, as a significant component of the documentary record before both the prosecution and the defense, Katz's report affected the course of the criminal proceedings independent of her testimony to its contents. Accordingly, this Court affirms the district court's refusal to grant Katz absolute immunity on Plaintiff's fabrication of evidence claim.

3. Carroll's and Clark's Pretrial, Nontestimonial Acts

Carroll and Clark argue that the creation of their investigatory notes should be protected by absolute immunity because Carroll and Clark testified consistently with the notes at Plaintiff's trial. Plaintiff responds that Carroll and Clark's investigatory notes - which record that neither officer told Plaintiff what had been stolen from the apartment - were the result of pretrial fabrication efforts by Carroll and Clark. These acts of fabrication would be pretrial, non-testimonial acts for which the officers are not entitled to absolute immunity. Like Katz's report, these notes comprise part of the documentary record before the prosecution and defense and affected the course of the criminal proceedings independent of

any testimony to the notes' contents. The absence of contemporaneous evidence documenting the officer's observations at the time would have been significant for cross-examination, for example. The notes could have affected the prosecution's willingness to continue toward trial. Their very existence, even if not introduced as evidence at trial, affected Plaintiff's criminal prosecution independent of the officers' testimony.

Like Katz, Carroll and Clark argue that their notes did not establish probable cause against Plaintiff and that this case is therefore distinguishable from *Spurlock*. Carroll and Clark misinterpret both *Spurlock* and the Supreme Court's *Buckley* decision. When Clark and Carroll created their investigative notes, they were acting in an investigative fashion. Whether the two officers created the notes before or after probable cause was established for Plaintiff's arrest is irrelevant for the question of absolute immunity. *Buckley*, 509 U.S. at 274 (refusing to grant absolute immunity to prosecutor for investigative actions taken after probable cause was established). The creation of the notes was a pretrial, nontestimonial act which does not merit absolute immunity. *See id.* at 273.

Carroll and Clark further argue that the gravamen of Plaintiff's complaint is that Clark and Carroll conspired to testify falsely. Yet Plaintiff had separate counts for conspiracy and fabrication of evidence before the court below, and at issue on this appeal, as stated in Plaintiff's brief, is whether Clark and Carroll merit absolute immunity for "falsely documenting and misrepresenting to the prosecutors before trial that they did not tell [Plaintiff] non-public information about the crime only the perpetrator could know." (Pl. Final Second Br. 32.) Plaintiff alleges and puts forth evidence that the investigative notes are false. Carroll and Clark are not

entitled to absolute immunity for those pre-trial acts; accordingly, this Court affirms the district court's refusal to grant Carroll and Clark absolute immunity on Plaintiff's fabrication of evidence claims.

4. Summary

The Supreme Court demands a functional test for the extension of absolute immunity for government actors. This Circuit has consistently held that absolute immunity for testimony at trial does not "relate back" to shield pretrial, nontestimonial acts such as fabrication of evidence. Accordingly, we affirm the district court's amended order and find that Defendants Katz, Carroll, and Clark are not entitled to absolute immunity on Plaintiff's fabrication of evidence claims.

B. QUALIFIED IMMUNITY

We review a district court's denial of qualified immunity *de novo*. *See Blake v. Wright*, 179 F.3d 1003, 1007 (6th Cir. 1999). At the outset, however, we must consider the scope of our jurisdiction over Defendants' interlocutory appeals.

1. Qualified Immunity Appeals as Interlocutory Appeals

The appeal of a denial of qualified immunity is an interlocutory appeal that this Court hears as a final decision of the district court under 28 U.S.C. § 1291 pursuant to the "collateral order" doctrine. *See Mitchell v. Forsyth*, 472 U.S. 511, 525-27, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). If the appeal fails the requirements of the collateral order doctrine, this Court lacks jurisdiction to entertain the appeal. Most denials of summary judgment are nonfinal orders which cannot be appealed under 28 U.S.C. § 1291. *Id.* Only to the

extent that a summary judgment order denies qualified immunity based on a pure issue of law may this Court entertain an interlocutory appeal. "A defendant who is denied qualified immunity may file an interlocutory appeal with this Court only if that appeal involves the abstract or pure legal issue of whether the facts alleged by the plaintiff constitute a violation of clearly established law." *Berryman v. Rieger*, 150 F.3d 561, 563 (6th Cir. 1998) (citations omitted).

The Supreme Court has clearly held that a district court's determination that there exists a triable issue of fact *cannot* be appealed on an interlocutory basis, even when that finding arises in the context of an assertion of qualified immunity. *See Johnson v. Jones*, 515 U.S. 304, 313, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995) ("[A] defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial.") The Supreme Court therefore held that 28 U.S.C. § 1291 could not serve as the basis for appellate jurisdiction for appeals from qualified immunity denials to the extent that those appeals took issue with the district court's determination that there existed a genuine issue of fact for trial. *Johnson*, 515 U.S. at 313.[5] To the extent that an

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[5] The Supreme Court reasoned that the collateral order doctrine required the issue on interlocutory appeal be sufficiently "separate" from the merits of the underlying litigation. *Johnson*, 515 U.S. at 311. The Supreme Court noted that when the issue on qualified immunity turned on whether the facts, as alleged, constituted a violation of clearly established constitutional law, the issue on appeal was sufficiently separate from the underlying issue of whether the defendant actually undertook the alleged acts, thereby satisfying the collateral order doctrine. *Id.* at 314. In contrast, the Supreme Court reasoned, when "a defendant simply wants to

appellant on an interlocutory appeal argues issues of fact and law on appeal, this Court will only entertain pure issues of law. To be clear, an appellant's contention that the district court erred in finding a genuine issue of fact for trial is *not* the type of legal question which we may entertain on an interlocutory basis. *Id.* To do so would interject appellate review into a district court's determination that the evidence is sufficient for trial, a nonfinal adjudiction for purposes of 28 U.S.C. § 1291 that is indistinguishable from all other, nonappealable, denials of summary judgment

2. *Claims of Wrongful Arrest and* Brady *Violations Against Tarter*

Tarter appeals, in part, the district court's denial of qualified immunity with reference to Plaintiff's allegations of wrongful arrest and *Brady* violations.

With respect to the wrongful arrest, Tarter's sole issue with the district court goes to the district court's determination that a reasonable jury might conclude that Tarter lacked probable cause to arrest Plaintiff following Ms. S's identification. The district court held that the jury might find that Tarter had "several reasons for believing Ms. S was mistaken [in her identification]" and that he therefore lacked probable cause to arrest Plaintiff. (J.A. at 205.)[6] In a § 1983

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appeal a district court's determination that the evidence is sufficient to permit a particular finding of fact after trial, it will often prove difficult to find any such 'separate' question - one that is significantly different from the fact-related legal issues that likely underlie the plaintiff's claim on the merits." *Id.*

[6] Ms. S's initial physical description of her assailant was inconsistent with Plaintiff, especially the fact that Ms. S reported

action, the existence of probable cause is a question of fact. *See United States v. Gaudin*, 515 U.S. 506, 521, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). Tarter does not dispute the legal theory of Plaintiff's claim - that without probable cause, the arrest would have violated Plaintiff's clearly established constitutional rights. Because Tarter's argument goes to "whether or not the pretrial record sets forth a 'genuine' issue of fact for trial" this Court lacks jurisdiction to entertain Tarter's appeal of the district court's denial of qualified immunity on Plaintiff's wrongful arrest claim. *Johnson*, 515 U.S. at 313.

The district court also denied Tarter qualified immunity on Plaintiff's allegation that Tarter withheld exculpatory evidence - the existence of the fourth rape - in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Again, Tarter's sole argument with the district court's denial of qualified immunity goes to whether there exists a genuine issue of fact for trial. Tarter argues that Plaintiff failed to establish that Tarter was aware of the fourth rape or that the fourth rape was, in fact, exculpatory. (Defs. Final Brief 50.)

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her attacker as "clean shaven" and Plaintiff had, in fact, worn a beard continuously for the last 10 years. There were also discrepancies in height, eye color, and hair length. Additionally, the identification was made pursuant to a one-on-one show-up and Ms. S had failed to pick Plaintiff out of a photopak. "An officer contemplating arrest is not free to disregard exculpatory evidence, even if substantial inculpatory evidence (standing by itself) suggests that probable cause exists." *Kuehl v. Burris*, 173 F.3d 646, 650 (8th Cir. 1999). An officer cannot "ignore substantial exculpatory evidence" in determining probable cause. *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 305-06 (6th Cir. 2005).

Both of these arguments take issue with the district court's determination that there exists a genuine issue of fact for trial. Exculpatory evidence is evidence which is material to either guilt or punishment, *Brady*, 373 U.S. at 87, and materiality under *Brady* is a mixed question of law and fact for the jury, *see United States v. Phillip*, 948 F.2d 241, 250 (6th Cir. 1991). The district court held that there exists a genuine issue of fact with respect to the materiality of the fourth rape. Moreover, whether Tarter was aware of the rape is an underlying issue of fact inherent in the district court's decision.[7] Accordingly, this Court lacks jurisdiction to entertain Tarter's appeal from the district court's denial of qualified immunity for Plaintiff's claim of *Brady* violations. *Johnson*, 515 U.S. at 313.

3. *Claims of* Brady *Violations and Fabrication of Evidence Against Katz*

Katz appeals the district court's denial of qualified immunity with reference to Plaintiff's allegations of *Brady* violations and fabrication of evidence.

Plaintiff alleges that Katz knowingly withheld the existence of two "non-matching" head hairs from the recovered pantyhose, or in the alternative, that she withheld knowledge that none of the hairs "matched." Plaintiff presents evidence that 7 "negroid" hairs were recovered from the pantyhose, while Katz's forensic report showed only 5 hairs, all of which Katz "matched" with Plaintiff. This presents

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[7] Plaintiff presents evidence that Tarter was the second officer assigned to investigate the fourth rape. The lead investigator for that fourth rape also testified that he shared information about the crime over the course of the investigation regularly with Tarter.

sufficient evidence such that a reasonable jury could conclude that Plaintiff's allegations are correct. The district court agreed. (*See* J.A. at 208 ("[T]here is a question of whether Defendant Katz's failure to disclose one or two dissimilar head hairs is material. Therefore, this is a question for the jury.").) If Plaintiff's allegations are correct, then Katz deliberately withheld the existence of those two nonmatching hairs. Katz "cannot seriously contend that a reasonable [investigator] would not know that such actions were inappropriate and performed in violation of an individual's constitutional . . . rights." *Spurlock*, 167 F.3d at 1005. Yet Katz's sole argument for qualified immunity to this Court is that her "failure to disclose," if any, amounts only to negligence. Katz's culpability is an issue of fact for a jury. We cannot entertain Katz's arguments going to disputed issues of material fact on this interlocutory appeal. *Johnson*, 515 U.S. at 313.

We similarly cannot entertain Katz's arguments for qualified immunity against Plaintiff's fabrication of evidence claim. Katz argues in the first instance that the district court was wrong to deny her absolute immunity on Plaintiff's fabrication of evidence claim, *see supra*, but in the alternative, Katz argues that she merits at least qualified immunity against this allegation. The district court did not address the application of qualified immunity to Plaintiff's fabrication of evidence claim against Katz. A review of the record shows that the parties dispute what the evidence shows. Plaintiff's expert reports that Katz's findings are far afield of what any reasonable forensic examiner would find from the evidence; this is sufficient evidence from which a jury might reasonably infer that Katz fabricated her report. The thrust of Katz's argument to this Court, however, is that Plaintiff's evidence at most establishes only a negligent

performance of her duties.[8] By arguing that the evidence establishes at most a negligent performance of her duties, Katz is arguing disputed issues of fact to this Court. We cannot entertain Katz's arguments going to disputed issues of material fact on this interlocutory appeal. *Johnson*, 515 U.S. at 313.[9]

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[8] Under law that was clearly established in 1992, Katz would have violated Plaintiff's constitutional rights if she "knowingly fabricated evidence against [him], and if there is a reasonable likelihood that the false evidence could have affected the judgment of the jury." *United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989). Plaintiff alleges that Katz knowingly fabricated her laboratory report and presents evidence in the form of expert testimony. Plaintiff's expert opines that Katz's conclusions that Plaintiff's hair "matched" the hair found at the first crime scene are far afield of what a reasonable forensic examiner would conclude; a reasonable jury could conclude in turn that Katz intentionally fabricated her report. Katz rebuts that her laboratory reports represent at most a negligent performance of her duties, and that an expert witness may not opine that someone else "fabricated" evidence and cites to a district court opinion in support, *United States v. Reicherter*, 318 F. Supp. 2d 265, 268 (E.D. Pa 2004).

[9] Katz also takes issue with Plaintiff's expert opinion. Katz argues that Plaintiff's expert improperly opined that Katz's report was a fabrication and cites a district court opinion for her authority. *See Reicherter*, 318 F. Supp. 2d at 268. Even were this Court to credit an out-of-circuit district court opinion as persuasive authority, Katz misinterprets the *Reicherter* holding. The *Reicherter* court held that a periodontal expert witness could not offer legally conclusive testimony that the bills of the defendant dentists were "fraudulent." *Id.* The court did allow the periodontist to testify to whether or not the dentists actually performed the procedures they claimed on their bills. *Id.* Similarly, Plaintiff offers expert opinion that the evidence presented to Katz for analysis does not and could not support the conclusions that Katz reached. Plaintiff's expert provides proper

4. Claim of Suggestive Show-up Against Tarter

The district court denied qualified immunity to Tarter in response to Plaintiff's allegations that Tarter used an unduly suggestive show-up procedure in getting Ms. S to identify Plaintiff. With respect to this claim, Tarter puts forth several legal arguments in this appeal. First, Tarter argues that there was no well established constitutional right in 1992 to be free of "show-ups." Second, Tarter argues that Plaintiff waived his right to contest the show-up, and therefore no due process violation could have occurred. Finally, Tarter argues that, as a matter of law, any due process violation that did occur was a result of the prosecutor's choice to use the show-up identification at trial, and not the direct result of Tarter's use of the show-up in the first instance. (*See* Defs. First Final Br. 36.) We address Tarter's arguments in turn.

This Court follows a two step inquiry in reviewing a claim for qualified immunity. First, we consider "(1) whether the plaintiff has asserted a violation of a known [] constitutional right; and (2) whether the constitutional right was so clearly established at the time in question that a reasonable official in the defendant's position would have known that he was violating the plaintiff's constitutional rights." *Hutsell v. Sayre*, 5 F.3d 996, 1003 (6th Cir. 1993) (citing *Siegert v. Gilley*, 500 U.S. 226, 231, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991)).

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testimony as to what a reasonable forensic examiner would do with hair examinations and an expert assessment of the evidence presented to Katz. Plaintiff's expert does not address the legal conclusion of "fabrication," which is properly left to the courts to decide.

Plaintiff certainly alleges the violation of a known constitutional right. Plaintiff argues that Tarter's use of the show-up violated Plaintiff's right to be free of unduly suggestive identification procedures. Criminal suspects have a constitutional right to be free from identification procedures "so unnecessarily suggestive and conducive to irreparable mistaken identification" that the identification's use violates due process of law. *Stovall v. Denno*, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967). If an impermissibly suggestive identification leads to a criminal conviction, the Supreme Court has held on a number of occasions that the defendant's conviction must be overturned. *See, e.g., id.*

Tarter argues that a reasonable officer would not have known that his use of the show-up was a violation of Plaintiff's constitutional rights, because show-ups are not *per se* unconstitutional. Yet the Supreme Court has held that police officers must evaluate the totality of the circumstances and reach a reasoned conclusion as to whether an identification procedure is impermissibly suggestive or not. *See Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). The Supreme Court has never said that law enforcement may do away with this consideration merely because a criminal suspect consents to come in for an identification procedure. On the contrary, the Supreme Court and this Court require an assessment of the circumstances *before* the decision to undertake a show-up. *Id.* This Court has never held that a police officer is free to ignore the constitutional restraints on police action merely because the constitution does not forbid such action *in all circumstances*. Tarter may as well argue that a police officer is free to make warrantless searches and seizures without fear of constitutional liability because the Constitution does not prohibit such searches in all cases.

This Court has entertained allegations of suggestive identification procedures as viable constitutional tort claims. *See, e.g.*, *Hutsell*, 5 F.3d 996 at 1005. To the extent that Tarter's decision to proceed with the line-up was a reasonable one in light of the infirmities of the situation, the decision is one for the finder of fact. An appeal of a denial of qualified immunity authorizes us only to address the issues of pure law. *Johnson*, 515 U.S. at 313.

Tarter also argues that Plaintiff waived his right to contest the show-up. The district court found a genuine issue of material fact going to whether Plaintiff's waiver was "knowing[], intelligent[], or voluntary[]." (J.A. at 203.) "A defendant may not appeal a district court's order denying a claim of qualified immunity 'insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial.'" *Sheets*, 287 F.3d at 585 (quoting *Johnson*, 515 U.S. at 320). We may not entertain Tarter's arguments which contest the district court's findings of genuine issues of fact for trial. *Johnson*, 515 U.S. at 313.

To the extent that Tarter is arguing that Plaintiff's consent to the show-up by signing the preprinted "waiver" form precludes any legal right to bring a due process claim, we find that Tarter misunderstands the law of constitutional waiver. Plaintiff does not have a right to a line-up versus a show-up. Plaintiff has a due process right which includes the right to be free from unduly suggestive and unreliable identification procedures. *Stovall*, 388 U.S. at 302. By consenting to a show-up in lieu of a line-up Plaintiff was not waiving this right, but merely agreeing to be put forth in front of a witness before his indictment, when Plaintiff had a right not to appear for an identification procedure at all. Plaintiff does not contest that had the show-up not been unduly suggestive, the identification would have been properly in

evidence. Rather, Plaintiff argues that as a result of circumstances unknown to him at the time, the show-up was unduly suggestive. Plaintiff did not "waive" any improper suggestiveness associated with the show-up by agreeing to appear. The preprinted waiver form does not include any language going to Plaintiff's right to due process or a fair trial. Criminal suspects may agree, for example, to appear for a line-up prior to any indictment or even arrest. Such agreement does not mean, however, that the suspects lose their right to contest any suggestiveness in the line-up not caused by them.

Finally, we come to Tarter's final argument. Tarter argues that it was the action of the prosecutor, in using the impermissibly suggestive identification at trial, which led to Plaintiff's injury, and not Tarter's procurement of the identification itself. It is true that an unduly suggestive identification does not, in and of itself, violate constitutional rights. *See Manson v. Brathwaite*, 432 U.S. 98, 113, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). It is also true that the prosecution's use of the identification at trial is a necessary intervening act for injury to occur and liability for any party to attach. *Id.* It is not true, however, that the prosecutor's discretion to control the state's case at trial is such an intervening act to excuse Tarter from the "natural consequences" of his actions and therefore any tort liability. In constitutional-tort cases, "a man [is] responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961). This principle led the Supreme Court in *Malley v. Briggs* to hold that the issuance of an arrest warrant will not shield the police officer who applied for the warrant from liability for false arrest if "a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the

warrant." 475 U.S. 335, 345, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) (footnote omitted). The Supreme Court's reasoning is directly applicable here. The prosecutor's decision to use the identification does not shield Tarter from liability if he reasonably should have known that use of the identification would lead to a violation of Plaintiff's right to a fair trial.

Accordingly, we find that the district court correctly denied Tarter qualified immunity for Plaintiff's claim of suggestive identification.

C. "MALICIOUS PROSECUTION" AGAINST KATZ

Plaintiff argues that the district court improperly dismissed Plaintiff's "malicious prosecution" claim against Katz. Plaintiff alleges that Katz caused his detention to be unlawfully continued by both fabricating evidence and withholding exculpatory evidence, the absence of either or both of which would have dissolved probable cause for Plaintiff's continued detention. Plaintiff and the district court both style this claim as a claim for "malicious prosecution." We find that Plaintiff states a viable cause of action. We also find, however, that continued use of the "malicious prosecution" label for Plaintiff's cause of action in this instance is somewhat of a misnomer. We take this opportunity to clarify the nature of this particular claim as it stands before this Court, for the benefit of both the case at bar and future litigants.

The substance of Plaintiff's claim against Katz is that his detention was continued without probable cause. Traditionally, the federal courts have grouped continued detention without probable cause with several other potential injuries under the umbrella of a "malicious prosecution"

claim, actionable under § 1983 as a violation of due process. *See Albright v. Oliver*, 510 U.S. 266, 271, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) (reviewing the circuit courts of appeals' treatments of a "malicious prosecution" claim under § 1983). The courts took this approach, in part, because of the wide range of potential injuries a wrongful prosecution could generate, from an unlawful seizure to a misuse of actual court process. The due process clause was more amenable to such variation. Accordingly, the circuit courts of appeals, including the Sixth Circuit, looked to the common law tort of malicious prosecution for help in defining the claim.

This traditional approach, however, is no longer valid in light of the Supreme Court's 1994 decision in *Albright v. Oliver*. The *Albright* plaintiff alleged what was traditionally labeled a "malicious prosecution" claim: a violation of his liberty interest in being "free from prosecution without probable cause" under the substantive due process clause of the Fourteenth Amendment when the defendants brought criminal charges against the plaintiff for selling a cocaine "look-alike" substance; a court later dismissed the case for failure to state an offense under Illinois law. *Id.* at 268-69. The *Albright* plurality found that the substance of the plaintiff's claim amounted to pretrial deprivations of liberty, and that the plaintiff was therefore actually alleging a Fourth Amendment - and not Fourteenth Amendment - violation. *Id.* at 274-75 (plurality opinion) (Rhenquist, C.J.). Because the *Albright* plaintiff had not petitioned for *certiorari* under the Fourth Amendment, the Supreme Court declined to address any Fourth Amendment claim. *Id.* at 275.

In their concurrences, Justices Ginsberg and Souter clearly articulated their understanding that Fourth Amendment protections extended beyond an initial seizure. *See id.* at 277-78 (Ginsburg, J., concurring); *id.* at 289-90 (Souter, J.,

concurring). Justice Ginsberg noted that "at common law, an arrested person's seizure was deemed to continue even after release from initial custody." *Id.* at 277-78. Justice Ginsberg reasoned that a person continued to be seized for Fourth Amendment purposes when their freedom of action was restrained due to the pending criminal proceedings (e.g., restrictions on travel, requirements to appear). *Id.* at 278. Justice Ginsberg also explicitly recognized that police officers may violate the Fourth Amendment by perpetuating an unlawful seizure when it is in their power to dissolve probable cause. *Id.* at 280. Justice Souter noted that many forms of damages and injury occur between an initial arrest and a criminal trial itself, recovery for which requires recognition of the Fourth Amendment's continuing protection. *Id.* at 290-91.

This Court has interpreted *Albright* as requiring that traditional claims for "malicious prosecution" be pursued and treated as Fourth Amendment violations when the gravamen of the complaint is continued detention without probable cause. *See Spurlock*, 167 F.3d at 1004-06.[10] Accordingly,

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[10] In the aftermath of *Albright*, this Court has not yet been faced with a § 1983 claim for an injury formerly treated under the "malicious prosecution" umbrella which does not allege, at heart, a Fourth Amendment injury. We do not decide today whether some claims formerly brought under the "malicious prosecution" umbrella might allege an injury distinct from Fourth Amendment protections - that is, an injury distinct from the type alleged in *Albright* - and survive as a due process violation in the post-*Albright* world. For a discussion of such potential claims, see John T. Ryan, Note, *Malicious Prosecution Claims Under Section 1983: Do Citizens Have Federal Recourse?*, 64 Geo. Wash. L. Rev. 776 (1996).

We acknowledge that some of our sister circuit courts of

Fourth Amendment jurisprudence directs the disposition of such claims. *Id.* We have also affirmatively recognized the viability of such Fourth Amendment-based claims under § 1983. The *Spurlock* panel was presented with the question of whether the defendant there was entitled to qualified immunity for his pretrial acts of evidence fabrication and witness coercion. *Id.* at 1005. The plaintiffs' amended complaint alleged, in part, violations of the plaintiffs' Fourth Amendment rights, and this Court found that "plaintiffs sufficiently raise claims that allege violations of their constitutional and/or statutory rights. Namely, that . . . [plaintiffs] were held in custody despite lack of probable cause to do so." *Id.* While this Court referred to the *Spurlock* plaintiffs' claim as one for "malicious prosecution," it is clear from the facts of the case that the gravamen of the plaintiffs' complaints was their continued, unlawful detention. *Id.* at 1006-07 (noting that "a reasonable police officer would be on notice that [] detaining a suspect, despite the fact that the

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appeals have addressed the parameters of a "malicious prosecution" claim since *Albright*. Until presented with factual circumstances meriting an analysis beyond the Fourth Amendment, however, we decline to reach the question about whether a non-Fourth Amendment "malicious prosecution" cause of action survives under § 1983 after *Albright*. We would also note that what our sister courts of appeals are calling a § 1983 malicious prosecution claim varies by circuit. *Compare Washington v. County of Rockland*, 373 F.3d 310, 316 (2d Cir. 2004) (requiring § 1983 malicious prosecution claims to be premised on a Fourth Amendment violation), *with Pierce*, 359 F.3d at 1294-97 (10th Cir.) (addressing a § 1983 "malicious prosecution" claim as implicating both the Fourth Amendment and due process). *See generally Castellano v. Fragozo*, 352 F.3d 939, 949 (5th Cir. 2003) (surveying the circuits for treatment of § 1983 "malicious prosecution" claims after *Albright*).

evidence used to detain the individual was fabricated, would [] be unlawful . . . .") ("The injuries alleged here occurred . . . at the very point at which [plaintiffs] continued to be detained, despite the lack of probable cause for such detention."). *Spurlock* therefore held that continued detention without probable cause is an actionable Fourth Amendment injury under § 1983 . *Accord Pierce*, 359 F.3d at 1292-93 (10th Cir.); *Gallo v. City of Philadelphia*, 161 F.3d 217, 225 (3d Cir. 1998); *Murphy v. Lynn*, 118 F.3d 938, 946 (2d Cir. 1997).[11]

While *Spurlock* restyled the cause of action for continued detention without probable cause in this Circuit, it did not establish a new constitutional right. Rather, *Spurlock* was responding to *Albright's* direction to change the legal analysis which courts apply to claims alleging a violation of the right. An investigative official had a duty both before and after *Albright* to refrain from engaging in acts which continued a person's detention without probable cause. We held as much in *Spurlock* against the defendant's argument that the change in legal analysis somehow altered the defendant's duties. 167

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[11] The dissent argues that *Spurlock* does not compel the result we reach here because the official capable of dissolving probable cause in *Spurlock* was a police officer and here the official is a state-employed forensic examiner. We find the distinction immaterial. Katz, as an expert forensic examiner in the employ of the state police, arguably has just as much, if not more in certain cases, influence over the existence of probable cause as a municipal police officer. Moreover, the dissent correctly notes that "[i]n the end, we do not know what effect Katz's analysis would have had upon the continuing detention of Gregory." This is exactly our point. It is not our job to find whether or not probable cause would have dissolved had Katz revealed the exculpatory information; this is the precise province of the jury.

F.3d at 1006. The *Spurlock* panel held that the right to be free of continued detention without probable cause was clearly established well before the 1993 events in question in the case at bar. *Id.* at 1006-07.

Finally, it is clear from *Albright* that we cannot continue to style all injuries formerly encompassed by the "malicious prosecution" basket as due process violations. Rather, we must "unpack" this basket to understand the underlying constitutional violation. A plaintiff must pursue relief under the appropriate constitutional guarantee, and the Court must apply the appropriate legal standard. A reading of *Albright* and *Spurlock* also makes clear that the subset of malicious prosecution claims which allege continued detention without probable cause must be pursued and analyzed under the Fourth Amendment. Seeking clarity in language, we decline to style Plaintiff's cause of action as an action for "malicious prosecution" under § 1983. Rather, we characterize the cause of action simply as the right under the Fourth Amendment to be free from continued detention without probable cause. Here, Plaintiff properly pled a Fourth Amendment violation in his complaint and pursued as much in the court below. We therefore apply Fourth Amendment analysis.

Plaintiff alleges that had Katz not unlawfully suppressed exculpatory information - that his hair did not match that found in the pantyhose, or alternatively, that there was a least one negroid hair which did not match Plaintiff's - probable cause for Plaintiff's continued detention would have been destroyed. Plaintiff also alleges in the alternative that Katz's fabrication of inculpatory information in the form of a false laboratory report led to Plaintiff's continued detention. Plaintiff presents evidence that Katz knew of and failed to disclose that there was at least one negroid hair that even her analysis did not associate with Plaintiff. Plaintiff also presents

evidence from which a jury could infer that Katz knew that none of Plaintiff's hair matched that found in the pantyhose, and thus that had this information been made known, probable cause for Plaintiff's continued detention would have dissolved. Because reasonable minds could differ on the questions of what Katz did and whether Katz's fabrication or failure to disclose would have dissolved probable cause, this is a question for the jury. *See Gaudin*, 515 U.S. at 521.

The district court dismissed Plaintiff's § 1983 claim against Katz premised on Plaintiff's continued detention because the court considered that Plaintiff's claim had its origins in Katz's suppression of exculpatory evidence and therefore was more properly pursued as a *Brady* violation. This Court agrees with the district court that Plaintiff's *Brady* and continued detention claims against Katz share a factual premise. This Court disagrees with the district court, however, that this similarity restricts Plaintiff to one theory of recovery over the other. The legal constructs of plaintiff's continued detention claim, which allege a Fourth Amendment violation, are distinct from a *Brady* claim, which alleges a due process violation. Plaintiff alleges *both* that his detention was unlawfully continued due to Katz's failure to disclose exculpatory evidence (what Plaintiff and the district court term his "malicious prosecution" claim) and that his right to a fair trial was abridged. The *situs* of injury is distinct and therefore Plaintiff should be able to pursue both legal theories. It is not the role of this Court to restrict Plaintiff's choice of viable legal theories. Other courts have allowed plaintiffs to pursue two legal theories under § 1983 premised on the same underlying facts. *See Atkins v. County of Riverside*, No. 03-55844, 151 Fed. Appx. 501, 505-06, 2005 U.S. App. LEXIS 19928, at *9-11 (9th Cir. Sept. 14, 2005) (unpublished opinion) (permitting plaintiff to pursue,

simultaneously, both a fabrication of evidence claim and a *Brady* violation claim).

Because there exists a genuine issue of material fact about whether Katz intentionally withheld exculpatory information in order to continue Plaintiff's detention without probable cause, this Court reverses the district court's grant of summary judgment on this claim.

We briefly address Katz's argument to this Court that Katz is, at minimum, entitled to qualified immunity against Plaintiff's malicious prosecution claim. Katz argues that probable cause for Plaintiff's arrest and detention existed independent of Katz's findings on Plaintiff's hair. We note that whether or not probable cause existed in the absence of the hair evidence, or whether probable cause would have been destroyed by a finding from Katz that the hairs from the crime scene could not have come from Plaintiff, is an issue of fact for the jury. *Id.* This Court cannot entertain an argument going to qualified immunity on an interlocutory appeal when the argument rests on disputed issues of fact. *Johnson,* 515 U.S. at 313.

D. SUPERVISORY LIABILITY

Plaintiff argues that the district court improperly dismissed his complaints against supervisory Defendants Thomas, Ammon, and Kessinger. The supervisory Defendants present a three-fold counterargument: 1) the statute of limitations had run by the time Plaintiff amended his complaint to name the supervisors and the amendment does not "relate back" to the timing of the original complaint, 2) Plaintiff has failed to support his claims for supervisory liability, and 3) Defendants are entitled to qualified immunity. Because the district court

did not err in disposing of Plaintiff's claim on the merits, we do not reach Defendants' other grounds.

"Supervisory liability under § 1983 cannot attach where the allegation of liability is based upon a mere failure to act." *Bass v. Robinson*, 167 F.3d 1041, 1048 (6th Cir. 1999) (citing *Leach v. Shelby County Sheriff*, 891 F.2d 1241, 1246 (1989)). Rather, the supervisors must have actively engaged in unconstitutional behavior. *Id.* Therefore, liability must lie upon more than a mere right to control employees and cannot rely on simple negligence. *Id.*

Defendant Thomas was the direct supervisor of Defendant Katz. Defendants Ammon and Kessinger were supervisors over Defendants Carroll and Clark. In order for liability to attach to any of these supervisors, Plaintiff must prove that they did more than play a passive role in the alleged violations or show mere tacit approval of the goings on. *Id.* Plaintiff must show that the supervisors somehow encouraged or condoned the actions of their inferiors. *Id.*; *see also Copeland v. Machulis*, 57 F.3d 476, 481 (6th Cir. 1995). Plaintiff, however, presents evidence only that supervisors Thomas, Ammon, and Kessinger failed to review their subordinates' work. (*See* Pl. Final Second Br. 62-65.)

Plaintiff argues that this Court's decisions in *Leary v. Williams* and *Taylor v. Michigan Department of Corrections* support his contention that supervisors who "knowingly abdicate specific responsibilities to oversee subordinates" can be held liable for their subordinates' unconstitutional acts. (*See* Pl. Final Second Br. 61 (citing *Leary v. Williams*, 349 F.3d 888, 903 (6th Cir. 2003) and *Taylor v. Mich. Dep't of Corr.*, 69 F.3d 76, 81 (6th Cir. 1995).) Under Plaintiff's theory, such complete abdication of supervision "tacitly acquiesced in, and predictably led to" the constitutional

violations in issue. (*See* Pl. Final Second Br. 62.) Essentially, we understand Plaintiff to interpret *Leary* and *Taylor* as establishing a "failure to supervise" theory of liability akin to *Monell* liability for "failure to train."

We believe Plaintiff misinterprets this Court's decisions in both *Taylor* and *Leary*. The *Taylor* panel had before it a defendant prison warden whose individual responsibility was to insure all prisoner transfers did not risk inmate safety. *See Taylor*, 69 F.3d at 80. By failing either to establish a reasonable system to review prisoner files before transfer, or review them himself, the warden approved transfers which directly affected prisoner safety and thereby resulted in violations of prisoner Eighth Amendment rights. *See id.* Similarly, the *Leary* plaintiff, a teacher, had presented evidence that the defendant, a school superintendent, was responsible for approving all teacher transfers after plaintiff alleged that her transfer was in retaliation for her exercise of free speech. The *Leary* defendant had stated that "he was the one who put the transfers 'into operation,'" 349 F.3d at 904, establishing the defendant's active participation in the constitutional violation. In both *Taylor* and *Leary* the plaintiffs presented evidence that it was the *active performance* of the defendants' individual job function which directly resulted in their constitutional injury. Plaintiff presents no evidence that any execution of the supervisors' job function resulted in Plaintiff's injury.

It is clear from the record that Plaintiff has failed to introduce evidence that would make Thomas, Ammon, and Kessinger liable in their role as supervisors of the alleged tortfeasors. We accordingly affirm the district court's dismissal of Plaintiff's supervisory liability claims.

E. CITY LIABILITY

1. City Liability Under § 1983

The district court granted the City summary judgment on all claims. Because we find that the district court erred when it dismissed Plaintiff's claims against the City, we reverse the district court's summary judgment for Defendant City.

Section 1983 does not permit a plaintiff to sue a local government entity on the theory of *respondeat superior*. *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 692-94, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). A plaintiff may only hold a local government entity liable under § 1983 for the entity's own wrongdoing. *Id.* A local government entity violates § 1983 where its official policy or custom actually serves to deprive an individual of his or her constitutional rights. *Id.* A city's custom or policy can be unconstitutional in two ways: 1) facially unconstitutional as written or articulated, or 2) facially constitutional but consistently implemented to result in constitutional violations with explicit or implicit ratification by city policymakers. *Id.* Where the identified policy is itself facially lawful, the plaintiff "must demonstrate that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences. A showing of simple or even heightened negligence will not suffice." *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 407, 117 S. Ct. 1382, 137 L. Ed. 2d 626 (1997) (quoting *Harris*, 489 U.S. at 388 (1989)). "Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Brown*, 520 U.S. at 410. In other words, the risk of a constitutional violation arising as a result of the inadequacies in the municipal policy must be

"plainly obvious." *Id.* at 412; *see also Stemler v. City of Florence*, 126 F.3d 856, 865 (6th Cir. 1997).

Plaintiff alleges: 1) that the City has an unconstitutional custom of using overly suggestive show-up procedures; and 2) that the City failed to train its officers in a) proper identification techniques and b) the requirement to disclose exculpatory material, such that the plainly obvious result is likely violations of well established constitutional rights - the same rights which Plaintiff alleges the individual Defendants violated in his case.

2. *Failure to Train on the Handling of Exculpatory Evidence*

The courts recognize a systematic failure to train police officers adequately as custom or policy which can lead to city liability. *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989). Only when the failure to train amounts to "deliberate indifference" on behalf of the city toward its inhabitants, however, will failure to train lead to city liability under § 1983. *Id.* at 389. The Supreme Court explained this standard in *Harris*:

> The issue . . . is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the

> city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

Id. at 390 (footnotes omitted).

Plaintiff can survive summary judgment under this standard by showing that officer training failed to address the handling of exculpatory materials and that such a failure has the "highly predictable consequence" of constitutional violations of the sort Plaintiff suffered. *See Cherrington v. Skeeter*, 344 F.3d 631, 646 (6th Cir. 2003) (referencing *Harris*, 489 U.S. at 390). In *Cherrington*, this Court held that a city's failure to train its officers on warrantless arrests was so likely to result in constitutional violations that the city's failure amounted to deliberate indifference. 344 F.3d at 646-47. Here, Plaintiff alleges that Tarter and Clark's failures to disclose exculpatory materials were the "'highly predictable consequence[s] of a failure to equip law enforcement officers with specific tools to handle recurring situations.'" (Pl. Final Second Br. 67 (citing *Brown*, 520 U.S. at 409.)) In their investigative capacities, police officers regularly uncover exculpatory materials. The Supreme Court has laid down very specific obligations of police officers on the disclosure of exculpatory materials. *See Brady*, 373 U.S. at 87. Widespread officer ignorance on the proper handling of exculpatory materials would have the "highly predictable consequence" of due process violations. *See Cherrington*, 344 F.3d at 646. Therefore this Court looks to the training City police officers received in handling exculpatory materials.

Plaintiff presents two forms of evidence in support of his failure to train claim: 1) expert testimony that LDP training on handling of exculpatory materials was nonexistent, and 2) deposition and inferential evidence that LDP officers generally did not receive any instruction in the handling of exculpatory materials. Plaintiff's expert reports that the City failed to properly train its officers in the handling of exculpatory materials. Plaintiff has deposition testimony from the Chief of Police that the Chief believed that officers were confused about their *Brady* obligations, but that the Chief could not recall any remedial steps or training having been taken. Plaintiff also presents evidence from current and former LDP Chiefs of Police and LDP officers that training would have been documented, but points out that the City has presented no evidence of any formal training on exculpatory materials.

The City counters that its officers have acknowledged their duty to disclose exculpatory evidence and avers that its officer have testified to training to that effect. The City's references to the Joint Appendix reveal one actual piece of evidence, deposition testimony from the former Chief of Police, which states that officers are trained to document and turn over to the prosecutor all evidence in their possession.

At a minimum, Plaintiff has presented sufficient evidence to survive summary judgment on his failure to train allegations regarding exculpatory materials. The obligation to turn over exculpatory materials is a significant constitutional component of police duties with obvious consequences for criminal defendants. This Court has held that evidence pointing to a City's failure to provide *any* training on key duties with direct impact on the constitutional rights of citizens is sufficient to survive summary judgment with a *Monell* failure to train claim. *See Sell v. City of Columbus*,

No. 00-4467, 47 Fed. Appx. 685, 2002 U.S. App. LEXIS 17955, at *27 (6th Cir. Aug. 26, 2002) (unpublished opinion) (reversing summary judgment for defendant city when Plaintiff had presented evidence that City failed to train officers in constitutional implications of evicting without a pre-eviction hearing).

This Court finds that the district court erred when it failed to consider that evidence of failure to train on the proper handling of exculpatory materials has the "highly predictable consequence" of constitutional violations. *See Brown*, 520 U.S. at 409. A custom of failing to train its officers on the handling of exculpatory materials is sufficient to establish the requisite fault on the part of the City and the causal connection to the constitutional violations experienced by Plaintiff. *Id.* at 407. Plaintiff has carried his burden for summary judgment.

The City avers that Plaintiff failed to plead a failure to train regarding *Brady* materials under *Monell* in his complaint and has therefore waived this avenue of recovery. But Plaintiff did claim failure to train under *Monell* for the City's identification procedures and all the objectionable behavior regarding the handling of exculpatory materials was articulated in Plaintiff's complaint. "The liberal notice pleading of Rule 8(a) is the starting point of" this Court's analysis of whether Plaintiff sufficiently put the City on notice of his claim and basis for seeking recovery. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). Here, Plaintiff's complaint clearly articulated the actions of City officers upon which Plaintiff based his demand for relief, articulating clear allegations related to exculpatory materials. We therefore reverse the district court's grant on summary judgment to the City on

Plaintiff's *Monell* liability theory for failure to train on the handling of exculpatory materials.

3. Custom of Overly Suggestive Show-ups

Plaintiff also alleges that the City had a custom of using overly suggestive show-ups and that the City failed to train its officers in proper identification techniques. The district court dismissed this claim, finding that Plaintiff had failed to make a showing of other complaints about the City's use of show-ups. In so holding, the district court overlooked both facts in this case and a significant prong of this Court's jurisprudence. First, Plaintiff need not present evidence of a pattern of complaints consistent with his own if he presents evidence of a written policy unconstitutional on its face. *Monell*, 436 U.S. at 692-94. The facts of this case show that the City's written line-up "waiver" form is direct evidence of a custom or practice, obviating the need for circumstantial evidence a court might otherwise seek. *See id.* Second, Plaintiff need not present evidence of other complaints if he can show that the City failed to train its officers in proper identification techniques, and that such failure to train had the "obvious consequences" of leading to constitutional violations of the sort experienced by Plaintiff. *See Cherrington*, 344 F.3d at 646.

One-on-one show-ups are inherently suggestive. *Cf. Stovall v. Denno*, 388 U.S. at 302; *see also Webb v. Havener*, 549 F.2d 1081, 1086-87 (6th Cir. 1977); *Haynes v. Bell*, No. 96-6443, 1998 U.S. App. LEXIS 9377, at *9-10 (6th Cir. May 6, 1998) (unpublished opinion). Yet the "primary evil" to be avoided with identification procedures is any "substantial likelihood" that an "irreparable misidentification" will take place. *See Neil v. Biggers*, 409 U.S. at 199-200. Therefore the Supreme Court has refused to find show-ups

per se unconstitutional. Rather, the Supreme Court has directed us to look to the totality of the circumstances to understand whether an identification made during a one-on-one show up is otherwise reliable. *Id.* The Supreme Court has directed us to look to 1) the opportunity of the witness to observe the perpetrator during the crime, 2) the witness' degree of attention, 3) the accuracy of the witness' prior description of the perpetrator, 4) the level of certainty demonstrated by the witness at the identification, and 5) the length of time between the crime and the confrontation. *Id.* We note that the Supreme Court's directions to the courts can also be stated in the inverse: show-ups are never *per se* constitutional.

The Supreme Court's teaching makes it clear that a failure to consider the totality of the circumstances, and the indiscriminate use of one-on-one show-ups, would have the obvious consequences of constitutional violations. "The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned." *Stovall*, 388 U.S. at 302. This condemnation exists because show-ups exacerbate weaknesses already existing in eye-witness identification. *See Marshall v. Rose*, 499 F.2d 1163, 1165 (6th Cir. 1974) ("[T]he danger inherent in eyewitness identification has long been a subject of grave concern.") By presenting only a single suspect to a witness, police convey an implicit message that "this is the guy." *See Foster v. California*, 394 U.S. 440, 442-43, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969). In *Foster*, the Supreme Court vacated the petitioner's conviction after finding that an identification which resulted only after the petitioner had been presented to a witness through a line-up, a subsequent one-on-one show-up, and then another line-up, was so suggestive that it "made it all but inevitable that [the witness] would identify petitioner whether or not he was in fact 'the man.'" *Id.*

Neither the Supreme Court nor this Court has ever found a show-up identification made after a witness failed to pick a suspect out of a line-up or photo array to be otherwise reliable and admissible into evidence. In fact, the jurisprudence from this Circuit and the Supreme Court teaches just the opposite. In *Foster*, the witness failed to make an identification at an initial line-up, despite a certain level of suggestiveness even in the line-up. 394 U.S. at 443. It was only after the witness saw the suspect again at a one-on-one show-up, at which the witness made a tentative identification, and finally at another line-up, did the witness make a firm identification. *Id.* The Supreme Court found the process so suggestive as to deny the suspect due process of law. *Id.* Likewise, this Circuit has found that a witness' repeated exposure to a suspect prior to identification so taints the identification that a substantial likelihood of misidentification exists. *See Thigpen v. Cory*, 804 F.2d 893, 897 (6th Cir. 1986); *see also United States v. McFarland*, 746 F.2d 1480, 1480 (6th Cir. 1984) (holding that the use of a coconspirator's photo identification violated due process when the witness and suspect had been arraigned together on a prior date and circumstances did not otherwise indicate that the identification was reliable).

Similarly, this Court has never found that an identification arising from a suggestive format was anything but *unreliable* when the witness' prior description of the suspect was significantly inconsistent with the suspect's actual appearance. *See id.*; *see also Webb*, 549 F.2d at 1086 (finding identification unreliable when prior description noted assailant had long sideburns, and identified suspect sported a mustache, but no sideburns, during the timeframe in question); *Marshall*, 499 F.2d at 1167 (finding that witness' description of suspect did not match actual physical appearance in a "crucial respect").

A custom or practice of using one-on-one show-ups indiscriminately is akin to conducting a search or seizure without an assessment of probable cause. While circumstances do exist which may justify the use of a show-up, just like circumstances do exist which justify a search without a warrant, a practice of going through with a show-up without consideration of the circumstances has the "highly predictable consequences" of resulting in constitutional violations. *See Brown*, 520 U.S. at 409. Eyewitness identifications are recurring situations in criminal investigations. Officers conducting a show-up must consider the circumstances and make a reasoned determination of whether, under the totality of the circumstances, the show-up would be so suggestive that there exists a "substantial likelihood" that an "irreparable misidentification" will take place. *See Neil*, 409 U.S. at 199-200. This Court has in the past held that a municipal practice of bypassing consideration of the circumstances in which the exercise of a city power is constitutional or not can lead to 42 U.S.C. § 1983 municipal liability. *See Sell*, 47 Fed. App'x at 695 ("If Columbus failed to instruct or train the officers responsible for emergency evictions about their constitutional responsibility to provide a hearing in all but 'extraordinary situations' . . . that shortcoming is one that is so likely to lead [to] a violation of the constitutional right to due process as to be deliberate indifference to citizens' constitutional rights, and give rise to municipal liability under § 1983.") Not all eyewitness identification opportunities - or even the vast majority - will pass the totality of the circumstances test such that a show-up would not lead to a due process violation.[12] A

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[12] The dissent reasons that Plaintiff has failed to show a pattern or practice of illegal activity. Yet the City's practice of "skipping" the *Neil v. Biggers* analysis shows such a pattern of illegal activity. Given the Supreme Court's "grave concerns" over the

municipality with a custom or practice of conducting show-ups without consideration of the circumstances therefore opens itself up to § 1983 liability.

The remaining question for this Court is whether the evidence, when viewed in the light most favorable to Plaintiff, is such that a reasonable jury could conclude that the City had a custom or practice of using show-ups without consideration of the circumstances, and that pursuant to this custom, Tarter employed a show-up with Plaintiff without consideration of Plaintiff's due process rights. Plaintiff puts forth evidence that the City had a custom of using show-ups in lieu of line-ups in non-exigent circumstances. Plaintiff's evidence includes affidavits from two police practice experts who opined that there existed systematic deficiencies in police officer training; that supervising LDP officers found it "perfectly acceptable" to conduct non-exigent show-ups days after a crime if an officer could get a suspect to sign a "waiver;" and that it was established practice to ask suspects in for a line-up, fail to take affirmative actions to constitute a line-up, and request consent to a show-up. (J.A. at 2330, 2332, 2334, 2208, 2236-38, 2241-42, 2247-50, 2275.) Plaintiff presents further evidence that using such show-ups was expressly approved through the existence of pre-printed waiver forms.[13] Such

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suggestiveness of show-ups, such a practice has the "highly predictable consequences" of leading to constitutional violations, which is the applicable standard here. Not every use of a show-up need lead to a constitutional violation for the City to exhibit "deliberate indifference" to the rights of its citizens. *See Sell*, 47 Fed. App'x at 695.

[13] The City argues in the alternative that Plaintiff "waived" his right to contest the suggestibility of the show-up when Plaintiff consented to the show-up by signing the City's pre-printed line-up "waiver"

forms are evidence of established practice. *See Sell*, 47 Fed. App'x at 692. Given this evidence, we cannot say that a reasonable jury could not conclude that the City had a custom or practice of conducting show-ups without consideration of the constitutional implications of such show-ups, and thus that the City was "deliberately indifferent" to the due process rights of its citizens. Accordingly, we reverse the district court's grant of summary judgment to the City.

F. MALICIOUS PROSECUTION AGAINST CLARK AND CARROLL

Plaintiff argues that the district court improperly dismissed Plaintiff's "malicious prosecution" claims against Carroll and Clark. Plaintiff alleges that both Clark and Carroll unlawfully continued Plaintiff's prosecution by creating false investigative notes and materially misleading the court at Plaintiff's preliminary hearing following his arrest for the assault on Ms. S. As we discussed *supra*, Part II.C in this opinion, we find that we must unpack Plaintiff's claim of "malicious prosecution" and look to the actual injury alleged in order to apply the correct legal analysis to Plaintiff's claims.

Plaintiff first alleges that Clark materially misled the court at Plaintiff's preliminary hearing and that Clark's reliance on the court's determination of probable cause was therefore unreasonable. If true, Plaintiff alleges a Fourth Amendment

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form. The judge at Plaintiff's criminal trial agreed, but found that "the [show-up] procedure would have been unduly suggestive had there not been a waiver . . . . There would have been serious problems with it." (J.A. at 1906-07.) As we discussed, *supra*, this take on Plaintiff's consent to the show-up misconstrues what took place and the nature of constitutional waiver.

violation. Plaintiff next alleges that Clark and Carroll caused his detention to be continued absent probable cause through the creation of false investigative notes. Plaintiff implies that absent the notes' existence, probable cause for Plaintiff's continued detention would have dissolved. This is also an allegation of a Fourth Amendment violation. We therefore apply Fourth Amendment analysis to plaintiff's claims for continued detention without probable cause against Clark and Carroll.

1. Material Misrepresentations to Establish Probable Cause

Police officers cannot, in good faith, rely on a judicial determination of probable cause when that determination was premised on an officer's own material misrepresentations to the court. *Yancey v. Carroll County*, 876 F.2d 1238, 1243 (6th Cir. 1989). Such reliance is unreasonable, and detention of an individual pursuant to such deceptive practices violates the Fourth Amendment. *Hill v. McIntyre*, 884 F.2d 271, 275 (6th Cir. 1989). This Court has held investigators subject to suit under § 1983 for making materially false statements either knowingly or in reckless disregard for the truth to establish probable cause for an arrest. *Id.* With Fourth Amendment rights implicated by ongoing, pretrial detention, deliberate obfuscation or omission of material facts by an investigator at the preliminary hearing makes the investigator's subsequent reliance on the hearing's conclusions unreasonable. *See Albright*, 510 U.S. at 280 (Ginsburg, J., concurring).

To establish that Clark or Carroll acted in an objectively unreasonable fashion in continuing Plaintiff's detention, Plaintiff must present evidence that the officers (1) stated a deliberate falsehood or showed reckless disregard for the truth and (2) that the allegedly false or omitted information was

material to the finding of probable cause. *Hill*, 884 F.2d at 275; *see also Spurlock*, 167 F.3d at 1006 ("[A] reasonable police officer would be on notice that unlawfully detaining a suspect, despite the fact that the evidence used to detain the individual was fabricated, would also be unlawful.").

At a preliminary hearing on June 15, 2002, Clark testified on direct examination that Mrs. V had twice identified Plaintiff. On cross-examination, Clark revealed that Mrs. V had failed to pick Plaintiff out of a photopak, but did not reveal that Mrs. V actually picked another photo. When asked if the police had any evidence against Plaintiff other that Mrs. V's identification, Clark responded "Not at this time." (J.A. at 1300.) When asked if Mrs. V had given a physical description of her assailant, Clark responded: "That's correct and it fits [Plaintiff.]" (J.A. at 1301.) When Plaintiff moved to dismiss for lack of probable cause, the judge denied the motion, but noted that "because of the extremely minimal burden on the Commonwealth that I'm gonna have to find probable cause but I'll state for the record it's just barely." (J.A. at 1302.)

Plaintiff argues that had Clark revealed that Mrs. V indicated another picture from the array, the judge's determination of probable cause may have swung the other way. The facts show that Mrs. V identified someone other than Plaintiff out of the photopak when asked to choose a picture of someone most closely resembling her attacker. Whether this selection by Mrs. V should have been disclosed by Clark is a question of materiality, and materiality determinations are the province of the jury when reasonable minds could differ. *Gaudin*, 515 U.S. at 512 (1995). Moreover, Clark stated on the stand that Mrs. V's description of her attacker "fit" Plaintiff, despite the fact that Mrs. V described her assailant as 5 feet 6 inches tall, with a stocky

build and long, straight, oily or greasy hair while Plaintiff was actually 5 feet, 11 ½ inches tall and had kinky hair. A reasonable jury could infer that this conclusion by Clark was so contrary to the facts known to him at the time that this statement was a material misrepresentation to the court.[14] Further, because the court at the time of the hearing just barely found probable cause, a reasonable jury could conclude that without the "fit" testimony or with the additional exculpatory information that Mrs. V had chosen another picture from the photopak, the preliminary hearing judge would have failed to find probable cause. As such, a jury could conclude the Clark's reliance on the court's determination of probable cause was unreasonable.

Accordingly, the district court erred when it dismissed Plaintiff's malicious prosecution claim against Clark. Because Carroll did not testify at the preliminary hearing, and Plaintiff presents no evidence or argument that Clark's knowledge can be imputed to Carroll, the district court properly dismissed Plaintiff's claim against Carroll insofar as it goes to Carroll's actions and knowledge relating to Mrs. V's photopak identification.

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[14] The dissent asserts that Clark "testified truthfully at the hearing." This is a factual determination for the jury, not this Court. The dissent also believes that Clark's assertion that the victim's description "fit" Plaintiff "appears reasonable." Again, this is a factual determination for the jury. We must deny summary judgment unless no reasonable jury could conclude that Clark's statements materially misled the court. Merely because a reasonable jury *could conclude* that the statements did not mislead does not mean that it would be unreasonable for the jury to *conclude to the contrary* and is not cause for this Court to take the decision away from the finder of fact.

Because we find that the district court improperly dismissed Plaintiff's § 1983 claim against Clark as premised on Clark's preliminary hearing testimony, we also address Clark's eligibility for qualified immunity against this claim. The district court did not reach the issue because it dismissed the claim on its underlying merits, but Clark addresses the issue in his brief to this Court (*see* Defs. Final Third Br. 14-15), and Plaintiff appears to refer to immunity when he states that "[n]o reasonable officer would have believed that probable cause existed to continue a prosecution against [Plaintiff] based on the 'evidence'" (Pl. Final Second Br. 59) in Plaintiff's argument on this issue.

Based upon the above analysis, Plaintiff has alleged a violation of a known constitutional right to be free of continued detention without probable cause. Plaintiff has presented evidence such that a jury could infer that Clark deliberately obfuscated the truth at the preliminary hearing and that such evidence is material. Hence, Plaintiff's continuing detention in reliance on the preliminary hearing findings would be unreasonable. This is a matter of fact for the jury.

2. Investigative Notes

We reach a different conclusion on the matter of the allegedly false investigative notes. Plaintiff argues that Clark and Carroll participated in his malicious prosecution by fabricating notes which falsely recorded that Plaintiff had independent knowledge of the items stolen from Mrs. V's apartment. We find here that Plaintiff has failed to establish a *Fourth Amendment* injury from the notes' existence and creation. The notes are *inculpatory* evidence only. There is no evidence that the notes were presented to the court at the preliminary hearing and contributed to the Court's

determination of probable cause to hold Plaintiff over for trial. Neither does Plaintiff point to evidence that the notes influenced any decision to proceed to trial. Without some link between the allegedly false investigative notes and Plaintiff's continued detention, Plaintiff fails to state a viable cause of action separate and apart from his fabrication of evidence claims, which, as discussed *supra*, the district court properly held could proceed under a due process theory.

We note the distinction here between Plaintiff's viable continued detention claim against Katz as premised on *Brady* violations, and Plaintiff's failed continued detention claim against Clark and Carroll as premised on fabrication of the notes. We held, *supra*, that Plaintiff could pursue *both* his *Brady* violation claim and his continued detention claim against Katz because the shared factual premise there - the concealment of exculpatory information - resulted in *both* unlawful pretrial detention and an unfair trial. Here, the fabrication of inculpatory information has no pretrial detention effect in the absence of additional evidence that the fabrications influenced the initial or continued detention. Accordingly, we find that although Plaintiff may pursue a fabrication of evidence claim based on the allegedly false investigation notes, Plaintiff has failed to establish any link between the notes and any Fourth Amendment injury.

3. Summary

Because a jury could reasonably infer that Clark's reliance on the probable cause determination from the preliminary hearing was unreasonable in light of Clark's material misrepresentations to the court, we reverse the district court's grant of summary judgment to Clark on Plaintiff's claim for continued detention without probable cause. We also find that Clark is not entitled to qualified immunity as a matter of law

against this same allegation. Because Carroll did not testify at the preliminary hearing, and Plaintiff presents no evidence that would impute Clark's knowledge to Carroll, we affirm the district court's dismissal of Plaintiff's § 1983 claims against Carroll insofar as they reach Carroll's actions and knowledge relating to Mrs. V's photopak identification.

III

CONCLUSION

For the foregoing reasons, this Court **AFFIRMS** in part and **REVERSES** in part the district court's decisions in this case. We affirm the district court's denial of absolute immunity to Defendants Clark, Carroll, and Katz for their pretrial, nontestimonial acts. We also affirm the district court's refusal to grant qualified immunity to Katz and Tarter. We similarly affirm the district court's grant of summary judgment in favor of supervisory Defendants Thomas, Ammon, and Kessinger. Finally, we affirm the district court's grant of summary judgment to Defendant Carroll with respect to Plaintiff's allegations that Carroll violated Plaintiff's Fourth Amendment rights by continuing Plaintiff's detention without probable cause.

We reverse the district court, however, on its grant of summary judgment to Defendant Katz with respect to Plaintiff's allegations that Katz violated Plaintiff's Fourth Amendment rights by failing to disclose exculpatory evidence, thereby causing Plaintiff's detention to continue without probable cause. We also reverse the district court's grant of summary judgment to Defendant Clark on Plaintiff's allegations that Clark violated Plaintiff's Fourth Amendment rights by continuing Plaintiff's detention without probable cause. Finally, we reverse the district court's summary

judgment for Defendant City on Plaintiff's *Monell* claims as they relate both to identification procedures and to disclosure of exculpatory evidence.

CONCURRING IN PART, DISSENTING IN PART

SILER, Circuit Judge, concurring in part and dissenting in part. I concur in most of the conclusions in the majority opinion, but I respectfully dissent from a few of those conclusions for the reasons set out herein. First, I agree with the majority's conclusion that there is no supervisory liability on the part of the defendants, Luanne Thomas, Darrell Ammon, and Wayne Kessinger. Therefore, the district court correctly granted summary judgment on their behalf. I also agree that the district court correctly found that the defendants, Joe Carroll, Steve Clark, and Dawn Katz, were not entitled to absolute immunity for their pretrial alleged fabrication of evidence.

However, I disagree with the majority's conclusion that the case of *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1244-45 (7th Cir. 1990), is in conflict with the law of this circuit. The *Buckley* court granted absolute immunity to an expert's pretrial activities, including the expert's evaluation of the physical evidence, written reports, discussion of the case with prosecutors, and preparation for testifying. 919 F.2d at 1244-45. Attempting to circumvent the absolute immunity protections granted to trial testimony, the plaintiff in that case had attacked the preparation of the expert testimony as a means of indirectly litigating the substance of the actual testimony given at trial. *Id.* The *Buckley* court ruled that the grant of absolute immunity for trial testimony would indeed be a "hollow immunity" if the aggrieved could so easily get around the bar, since almost all expert testimony entails extensive preparations and discussions with prosecutors. *Id.*

at 1245. However, the court limited its holding by noting that absolute immunity might not apply where that expert's pretrial activities "violated a suspect's rights independently," by, for example, "'cooking' a laboratory report." *Id.* The crucial factor in that case was that nothing in the complaint suggested that the expert defendants "hid evidence, as opposed to misinterpreting it." *Id.* I do not think this is inconsistent with the law of this circuit.

I also agree with the majority that the denial of qualified immunity for the defendants, Katz and John Tarter, was proper. Under the allegations by the plaintiff, Katz and Tarter would not be entitled to qualified immunity. I agree with the majority's conclusion that the district court correctly granted summary judgment to Carroll with respect to the allegations that Carroll violated Gregory's Fourth Amendment rights by continuing Gregory's detention without probable cause.

On the other hand, I differ with the majority in reversing the summary judgment granted to Katz on the Fourth Amendment malicious prosecution claim. I would instead follow the majority's reasoning in upholding the grant of summary judgment to Carroll on the malicious prosecution claim. Like Carroll, Katz did not testify at the preliminary hearing, nor was any conclusion by Katz concerning the examination of the hairs from the pantyhose brought to the attention of the court at the preliminary hearing. Given that probable cause had already been established, I do not find any authority for the proposition that after probable cause has been established a witness who knows of likely exculpatory evidence is violating the Fourth Amendment unless the witness quickly reveals that evidence to the court. Apart from the problems associated with how to determine the effect of Katz's information upon the court's previous finding of probable cause, the reasoning of the majority would create

numerous practical problems since investigations often turn up a plethora of facts supporting either side's case. In effect, the duty outlined by the majority would create a requirement that a court perpetually reexamine its probable cause determination in light of each new piece of evidence collected, as any piece of evidence could theoretically affect that determination. Moreover, in articulating this proposition, the majority only relies upon two lone concurrences from the Supreme Court, *see Albright v. Oliver*, 510 U.S. 266, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) (Ginsburg, J., concurring and Souter, J., concurring), and a prior decision of this court involving the fabrication of probable cause by a police officer, *see Spurlock v. Satterfield*, 167 F.3d 995, 1006-07 (6th Cir. 1999). Neither of these decisions compels the majority's result. In the end, we do not know what effect Katz's analysis would have had upon the continuing detention of Gregory, as the court had already found probable cause. Perhaps in the long run it matters very little, for the *Brady* issue is still pending against Katz and it seems an adequate vehicle through which to address any concerns about the withholding of exculpatory evidence. In closing, I would not find it to be a Fourth Amendment violation solely for Katz's failure to provide this information after the court had found probable cause without any input from her.

I also dissent from the majority's conclusion that the district court erred in dismissing the Fourth Amendment malicious prosecution claim against Clark. I agree with the district court that there was probable cause to arrest and detain Gregory. The victim had sought out an arrest warrant for Gregory and had, on two separate occasions, identified Gregory in person, although both of these identifications appear to be suspect. The question of probable cause is not proof beyond a reasonable doubt. *See United States v. Strickland*, 144 F.3d 412, 416 (6th Cir. 1998). Here, Clark

testified truthfully at the hearing[1] and, although he did not mention that the victim had picked another picture out of a photo line-up, he did testify that the victim had been unable to identify Gregory in that photo line-up. Given this, I would not find that a Fourth Amendment violation occurred when Clark testified in the preliminary hearing. *See Darrah v. City of Oak Park*, 255 F.3d 301, 312-13 (6th Cir. 2001); *see also Ahlers v. Schebil*, 188 F.3d 365, 370 (6th Cir. 1999) (noting that eyewitness identifications are "generally entitled to a presumption of reliability and veracity"). Although he may have had some information which was exculpatory, that is, that the complainant picked out another photograph at the first identification, he was not asked about it, and he did not lie to the court. I do not think that there is authority for the proposition that witnesses, in this context, are under an absolute duty to inform the court of any and all potential exculpatory information. *Cf. Mays v. City of Dayton*, 134 F.3d 809, 816 (6th Cir. 1998) ("Because the consequences of arrest or search are less severe and easier to remedy than the consequences of an adverse criminal verdict, a duty to disclose potentially exculpatory information appropriate in the setting of a trial to protect the due process rights of the accused is less compelling in the context of an application for a warrant.").[2] However, I do agree with the majority in its

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[1] Despite the majority's conclusion that Clark potentially made a material misrepresentation to the court by saying that the victim's description of her assailant fit Gregory, Clark's testimony appears reasonable especially given the broad description of the assailant tendered by the victim.

[2] The *Mays* court went on to note:

> To interweave the *Brady* due process rationale into warrant application proceedings and to require that all potentially

conclusion that the allegedly false investigative notes do not establish a Fourth Amendment injury, because the notes are inculpatory evidence only.

Finally, on the question of municipal liability, I agree with the majority that, under *Russo v. City of Cincinnati*, 953 F.2d 1036, 1046-47 (6th Cir. 1992), Gregory has presented sufficient evidence to state a claim against the City for a policy of inadequate training or supervision regarding police officers' duty to disclose exculpatory material. However, I think that Gregory's municipal liability claim alleging that the City had a custom of using overly suggestive show-ups is not a viable claim. In order to state a viable custom claim, a plaintiff must show, among other things, a "clear and

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> exculpatory evidence be included in an affidavit, places an extraordinary burden on law enforcement officers, compelling them to follow up and include in a warrant affidavit every hunch and detail of an investigation in the futile attempt to prove the negative proposition that no potentially exculpatory evidence had been excluded. Under such a scenario, every search would result in a swearing contest with participants arguing after the fact over whether exculpatory evidence even existed.
>
> For these reasons, as well as to resolve any confusion resulting from prior opinions, we reiterate that except in the *very* rare case where the defendant makes a strong preliminary showing that the affiant *with an intention to mislead* excluded critical information from the affidavit, and the omission is critical to the finding of probable cause, *Franks* [*v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)] is inapplicable to the omission of disputed facts.

134 F.3d at 816 (emphasis in original).

persistent pattern of *illegal* activity" and "the defendant's tacit approval of the *unconstitutional* conduct." *Thomas v. City of Chattanooga*, 398 F.3d 426, 429 (6th Cir. 2005) (alterations and citations omitted) (emphasis added). Here, Gregory has shown a clear and persistent pattern of one-on-one show-ups that the City tacitly approved. However, he has not shown that these show-ups were either illegal or unconstitutional. The Supreme Court has said that the use of one-on-one identification procedures is not always unconstitutional and must be considered on a case-by-case basis. *See Neil v. Biggers*, 409 U.S. 188, 196-97, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). Although the show-up conducted in this case may have been unconstitutional, a plaintiff "cannot rely solely on a single instance" to prove the existence of an unconstitutional custom. *See Thomas*, 398 F.3d at 433. In the end, Gregory has failed to put forward facts indicating that the City had a custom of conducting unconstitutional show-ups and has therefore failed to prove a necessary element of his custom claim.

Therefore, for all these reasons stated, I would uphold the district court in all of its rulings, except for the one ruling dismissing the City of Louisville on the policy of inadequate training or supervision concerning the disclosure of exculpatory information.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 3:01 CV-535

[Filed June 22, 2004]

WILLIAM THOMAS GREGORY	)
PLAINTIFF	)
	)
V.	)
	)
CITY OF LOUISVILLE, ET AL.	)
DEFENDANTS	)
	)

ORDER

This matter is before the court on the parties' motions for reconsideration (Dkt. Nos. 117 & 118). Responses to the Motions (Dkt. Nos. 121, 125, & 127) and replies to the responses (Dkt. Nos. 124 & 131) have been filed. A motion to reconsider will be granted in one of the following situations: a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice. *Gencorp, Inc. v. Am. Int'l Underwriters,* 178 F.3d 804, 834 (6th Cir. 1999). "A motion under Rule 59(e) is not an opportunity to re-argue a case." *Sault Ste. Marie Tribe of*

Chippewa Indians v. Engler, 146 F.3d 367, 374 (6th Cir. 1998).

Mr. Gregory argues that Defendants Katz, Clark, and Carroll should not be absolutely immune for their non-testimonial pre-trial actions, which formed the basis for their allegedly false trial testimony. In *Spurlock, the* police officer was held to be absolutely immune for the false testimony he gave at trial. *Spurlock v. Satterfield,* 167 F.3d 995, 1001 (6th Cir. 1999). However, the police officer was not given absolute immunity where the police officer fabricated a new piece of physical or documentary evidence such as fabricating a videotape or making a false report of a witness's testimony, *Id.* at 1001-02. The key difference is that the police officer must do some non-testimonial act to create new evidence before the trial or anytime other than the trial rather than merely telling a lie. *See, e.g., Castellano v. Fragozo,* 352 F.3d 939, 958 (5th Cir. 2003) (stating "non-testimonial pretrial actions, such as the fabrication of evidence, are not within the scope of absolute immunity because they are not part of the trial."); *Paine v. City of Lompoc,* 265 F.3d 975, 982 (9th Cir. 2001); *Jones v. Cannon,* 174 F.3d 1271, 1279, 1286-89 (11th Cir. 1999)(police officer fabricated a bootprint).

In Spurlock, the Sixth Circuit Court of Appeals announced the following rationale for denying absolute immunity in fabrication of evidence cases:

> What plaintiffs, in essence, allege here is the fabrication of probable cause, and contrary to Satterfield's argument, the fabrication of probable cause cannot be immunized by later providing false testimony. Obviously, the two alleged acts, manufacturing false evidence and later presenting that

> false evidence in the form of testimony are inextricably linked. Nonetheless, we find that adopting Satterfield's reasoning would lead to the untenable result that officials who fabricate evidence or manufacture probable cause could later shield themselves from liability simply by presenting false testimony regarding that evidence.

Spurlock, 167 F.3d at 1003-04 (citations omitted). The Ninth Circuit Court of Appeals has also stated it would not grant absolute testimonial immunity to defendants to "shield an out-of-court, pretrial conspiracy to engage in non-testimonial acts such as fabricating or suppressing physical or documentary evidence..." *Paine,* 265 F.3d at 983. *See also Ienco v. City of Chicago,* 286 F.3d 994, 1000 (7th Cir. 2002) (holding officer who lied to prosecutors did not have absolute immunity even though he testified consistently with his statement to prosecutors.). Further, "a pretrial, out-of-court effort to keep certain witnesses or physical evidence from the opposing party or to fabricate physical evidence need not involve anyone who will participate in the trial as a witness, and so is not 'inextricably tied'-or tied at all-to any witness' own testimony." *Id.* at 982.

If Gregory's allegation about Katz deliberately misreporting the hair results is correct, then this is equivalent to creating physical evidence that did not exist previously. Further, Katz created new evidence by creating the report itself. Katz's acts of examining the hairs and allegedly creating false reports occurred pre-trial and are non-testimonial acts. As these acts are non-testimonial pre-trial acts, they are separable from trial testimony. Therefore, Katz does not have absolute immunity for these acts because they are separable from her trial testimony. Police investigators should not be allowed to present testimony at trial in order to

gain immunity for their pre-trial fabrications. Therefore, Gregory's motion to reconsider as it applies to the grant of absolute immunity to Katz for non-testimonial acts is granted.

Mr. Gregory argues that Clark and Carroll should not receive absolute immunity for their fabrication of evidence. Clark and Carroll wrote in their report that they did not tell Mr. Gregory what items were taken from the first rape victim's apartment but they overheard Mr. Gregory telling a friend what items were taken. Mr. Gregory claims that Clark and Carroll did in fact tell him what items were taken and he merely repeated them to his friend while he was at the police station. Clark and Carroll's later testimony cannot act as a shield to protect them from their previous pre-trial act of creating a false report about statements of a witness, in this case, the accused. *See Spurlock,* 167 F.3d at 1001-02 (holding that officers did not have absolute immunity for creating a false report of a witness's testimony.).

The nature of the pretrial acts of Clark and Carroll is considerably different than that of the pre-trial acts of Katz. Katz allegedly misread the study of the hairs, came to an intentionally false conclusion, and prepared a report based on this fabricated evidence. Clark and Carroll allegedly prepared a false report of statements they made to Mr. Gregory. While the Court finds this is a closer question, upon further reflection the underlying allegations of fabrication are the same. It is only the degree which is different. The Court concludes it was in error in its original opinion and that Clark and Carroll do not have absolute immunity for their pretrial acts; Gregory's motion to reconsider is granted.

Defendant Katz argues that no *Brady* violation occurred because Mr. Gregory knew that the hairs were not his. Therefore, Mr. Gregory should have had the hairs

independently examined to discover the truth. This would be a convincing argument but for the fact that the hairs could have been shown to be similar to Mr. Gregory's hairs using hair microscopy and still not have been Mr. Gregory's hairs. Here, the determining factor is that Ms. Katz is alleged to have withheld the true nature of the evidence: the hairs could not have been Mr. Gregory's hair.

IT IS HEREBY ORDERED:

Plaintiff's motions to reconsider as it applies to absolute immunity to Defendants Katz, Clark and Carroll for their non-testimonial pre-trial acts are **GRANTED**. All other motions for reconsideration are **DENIED**.

This is the 21 day of June, 2004.

/s/_____
Thomas B. Russell, Judge
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 3:01CV-535

[Filed March 29, 2004]

WILLIAM THOMAS GREGORY, PLAINTIFF

v.

CITY OF LOUISVILLE, ET AL., DEFENDANTS

JUDGES: Thomas B. Russell, Judge United-State District Court.

MEMORANDUM OPINION

This matter is before the court on Motions for Summary Judgment by the Plaintiff and Defendants. First, Defendant Dawn Katz filed a Motion for Summary Judgment (Dkt. # 67), Plaintiff William Thomas Gregory filed a Response (Dkt. # 77), and Defendant Katz filed a Reply (Dkt. # 87). Then, Defendants City of Louisville, Louisville Division of Police, Joe Carroll, Steve Clark, John Tarter, Hope Greer, Darrell Amon, Wayne Kessinger, Jay Pierce, and Eugene Sherrard

filed a Motion for Summary Judgment (Dkt. # 70), Plaintiff filed a Response (Dkt. # 96), and Defendants City of Louisville, Louisville Division of Police, Joe Carroll, Steve Clark, John Tarter, Hope G ;er, Darrell Amon, Wayne Kessinger, Jay Pierce, and Eugene Sherrard filed a Reply (Dkt. # 99). Next, Defendants Luanne Thomas, Captain John Vance, Major L.E. Burgin, Lt. Col. Roy Sturgill and Billy G. Wellman filed a Motion for Summary Judgment (Dkt. # 71), Plaintiff filed a Response opposing Luanne Thomas's Motion for Summary Judgment (Dkt. # 78), and Defendant Thomas filed a Reply (Dkt. # 88). Finally, Plaintiff filed a Motion for Summary Judgment against Defendant Katz (Dkt. # 74), Defendant Katz filed her Response (Dkt. # 79), and Plaintiff filed a Reply (Dkt. # 86). For the reasons that follow, **these motions are GRANTED in part and DENIED in part.**

BACKGROUND

In August 1993, Plaintiff William Thomas Gregory was convicted of Rape in the First Degree, Criminal Attempt Rape in the First Degree, and two counts of Burglary in the First Degree. After Plaintiff used DNA evidence to establish his innocence in state court, his conviction was vacated on July 6, 2000 and all charges against him were dismissed on August 25, 2000. Mr. Gregory filed suit on August 24, 2001, alleging claims under 42 U.S.C. § 1983 and state law for intentional, reckless, and negligent infliction of emotional distress, outrage, false arrest, malicious prosecution, wrongful conviction, and illegal confinement. Named as defendants in this suit are the City of Louisville, Kentucky, the Louisville Division of Police, police officers Joe Carroll, Steve Clark, Hope Greer, and John Tartar, and forensic serologist Dawn Ross Katz, as well as several unknown defendants with the Louisville police department and the Kentucky State Police laboratory.

According to Mr. Gregory's Complaint, his conviction stemmed from two sexual assaults that occurred in his apartment complex during the summer of 1992. The first of these assaults happened on June 1, 1992, when Ms. V., a white woman, was awakened by an unknown, nude black male intruder standing over her bed. This intruder, who wore a pair of the victim's panty hose as a mask, struggled with the victim, choked her, fondled her breasts, and attempted to rape her. Ms. V. fought off this attacker, and pulled off his pantyhose mask and scratched his face before he ran outside. Ms. V. described her assailant as a black male, 30-40 years old, 5 feet 6 inches tall, with a stocky build and long, straight oily or greasy hair. The assailant stole a television and a compact disc player from the apartment (Dkt. # 66).

Neighbors of Ms. V. saw her immediately after the attack. When the neighbors and the victim's mother, all white, were told the description of the attacker, the residents and the mother informed police that they thought this description matched that of complex resident William Gregory.

Later in the day on June 1, 1992, Ms. V. saw Mr. Gregory in the apartment complex and the police were again called to the scene. Several police officers went to Mr. Gregory's apartment, and, telling him that they were investigating an incident unrelated to Ms. V.'s assault, were allowed to search the apartment. This search revealed no evidence linking Mr. Gregory to V.'s attack, and the officers observed no marks or injuries on Mr. Gregory's face, arms or torso.

Two days later, Defendants Carroll and Clark showed a "photopack" that included Mr. Gregory's picture to Ms. V. She initially made no identification and protested that she needed to see the man who attacked her in person. When

asked by the officers to pick out the person who was similar to her attacker, Ms. V. chose someone other than Mr. Gregory's. Ms. V.'s mother also looked through the photos as well, and she identified Mr. Gregory as the person who lived in the apartment complex.

Hours later, Ms. V.'s mother contacted police and told them that her daughter had seen Mr. Gregory in person and that she was now sure he was the assailant. With the assistance of Defendants Carroll and Clark, Ms. V. swore out a criminal complaint that resulted in Mr. Gregory's arrest at his place of work.

According to testimony of Defendants Carroll and Clark at Mr. Gregory's trial, following his arrest, Mr. Gregory called a friend and told her what items were stolen from Ms. V's apartment. However, Defendants denied telling Mr. Gregory about the items (Dkt. # 67). Mr. Gregory claims that Defendants Clark and Carroll told him what was stolen from the apartment.

On or about July 13, 1992, Defendant Katz, as Kentucky State Police Crime Laboratory Examiner, conducted hair comparison examinations of samples from Mr. Gregory and hair fragments found in pantyhose at the scene of the crime. Defendant Katz concluded that "Mr. Gregory's head hair standard was similar in color and microscopic characteristics with the Negroid hairs recovered from the pantyhose." (Dkt. # 67). Katz noted 5 head hairs were similar to Mr. Gregory's head hair (*Id.*). However, two additional head hairs were found in the mask. At least one of them was a Negroid hair.

On July 14, 1992, the Jefferson County Grand Jury indicted Mr. Gregory for the burglary and attempted rape Ms. V (*Id.*). These offenses were resubmitted to the grand jury on

December 4, 1992 and Mr. Gregory was again indicted on these same offenses (*Id.*). Defendant Katz's lab report was not given to the December 4th grand jury (*Id.*).

The second attack occurred on July 19, 1992. During the early morning hours, Ms. S., a 71 year old white woman, was awakened by a nude black male in her apartment. This black male, who was armed with a large bread knife, forced Ms. S. to engage in sexual intercourse before leaving the residence. The Louisville Police Department sent a sexual assault kit from this incident to Defendant Katz for examination (*Id.*). Defendant Katz's report on the sexual assault kit did not implicate Mr. Gregory (*Id.*).

Ms. S. described her attacker to the police as a black male, late 20s to mid 30s, with a slender to small build, short black and curly hair, with a round, clean-shaven face. She also indicated that her assailant felt very greasy around his neck and shoulder area.

Upon learning from another police officer that William Gregory had been charged with a similar type of attack on Ms. V. in the same apartment complex a month and a half ago and that he had been out on bail at the time of Ms. S.'s attack, Defendants John Tarter and Hope Greer, both white, visited Ms. S. with a photopack display containing Mr. Gregory's picture and five others. Ms. S. was unable to make any identification from this photo display.

Undeterred by Ms. S.'s failure to identify Mr. Gregory in the photo display of Mr. Gregory and five other men, Tarter and Greer contacted Mr. Gregory's then-counsel and requested that Mr. Gregory appear in a line-up in the presence of Ms. S. Upon arriving at the police department for the requested line-up, Mr. Gregory and his attorney were

informed that it would take some time to gather people with any similarity to his appearance and Mr. Gregory was asked to agree to a one-on-one show up instead. Neither Mr. Gregory nor his attorney were informed that Ms. S. had already seen his face in the photopack, but had not identified him then. Further, Tarter did not tell his supervisor or the prosecutor that Ms. S. had failed to identify Mr. Gregory in a photo display.

After the one-on-one show-up, Ms. S. told the police that Mr. Gregory was her attacker, based upon his grey eyes even though Mr. Gregory has brown eyes. Mr. Gregory was arrested immediately following Ms. S.'s identification. While Mr. Gregory was incarcerated following this second arrest, a third similar sexual assault was committed in the same vicinity on August 14, 1992.

Mr. Gregory did not match either initial description given by Ms. V. or Ms. S.. He is 5 feet 11 ½ inches tall and had a potbelly at the time of his arrest. He had a full beard, which he had worn continually for ten years. In the summer of 1992, Mr. Gregory was 44 years of age.

On August 10, 1993, Mr. Gregory was tried for the crimes against Ms. V. and Ms. S. (Dkt. # 67). Mr. Gregory was convicted on all charges on August 16, 1993 (*Id.*). On October 25, 1995, Katz received a request from the Innocence Project asking her to continue preserving the pantyhose hairs (*Id.*). Defendant Katz had preserved the hairs from the pantyhose (*Id.*). On March 6, 1998, Katz was authorized by the Jefferson County Commonwealth Attorney to release the head hairs for DNA testing (*Id.*).

STANDARD

A movant is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Facts are "material" in a summary judgment inquiry only when they could affect the case's outcome under the controlling substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Stated differently, "it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." *Id.* Furthermore, an issue of material fact is "genuine" only when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* "The mere existence of a scintilla of evidence in support of the plaintiffs position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252.

DISCUSSION

A. Claims against Louisville Division of the Police

A police department may not be sued; the City of Louisville is the proper party to address the claims in the complaint. *Matthews v. Jones*, 35 F.3d 1046, 1049 (6th Cir. 1994); *See also Jones v. Union* County, 296 F.3d 417, 421 (6th Cir. 2002). Therefore, the claims against the Louisville Division of the Police shall be dismissed.

B. Hope Greer

Ms. Greer showed Ms. S. a photo pack on July 19, 1992 and she met with Ms. S. and her son (Dkt. # 70). Also, she went to the crime scene (*Id.*). However, Ms. Greer did not participate in the one-on-one show-up or the Mr. Gregory's arrest (*Id.*). Therefore, Ms. Greer was not involved in any of Mr. Gregory's claims. The claims against Ms. Greer shall be dismissed.

C. Supervisor Liability

"Supervisory liability under § 1983 cannot be based upon a mere failure to act but must be based upon active unconstitutional behavior." *Combs v. Wilkinson*, 315 F.3d 548, 558 (6th Cir. 2002). Further, Mr. Gregory must show that the supervisor encouraged or condoned the actions, played more than a passive role, or showed more than a mere tacit approval of the actions. *Bass v. Robinson*, 167 F.3d 1041, 1048 (6th Cir. 1999). Another recent 6th Circuit opinion states that a plaintiff must show more than the supervisor's negligence, recklessness, or sloppiness, but must show the supervisor's deliberate indifference to the Plaintiffs constitutional rights. *Doe v. City of Roseville*, 296 F.3d 431, 439-40 (6th Cir. 2002).

> Supervisor liability [under § 1983] occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation. The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he [she] fails to do so. The deprivations that

> constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant, and of continued duration, rather than isolated occurrences.

Id. at 440.

Both Mr. Gregory and Defendants Ammon, Kessinger, Pierce, and Sherrard agree that Defendants Ammon, Kessinger, Pierce, and Sherrard failed to review some of Defendants Clark, Carroll, and Tarter's work (Dkt. Nos. 96 & 99). The failure to review some of the work of Defendants Clark, Carroll, and Tarter was at most a failure to act or negligence, but it does not rise to the level of deliberate indifference; therefore, these defendants must be dismissed on the issue of supervisor liability.

Next, Defendant Thomas failed to review all of the work of Defendant Katz. The failure to review some of the work of Defendant Katz was at most a failure to act or negligence, but it does not rise to the level of deliberate indifference; therefore, these defendants must be dismissed on the issue of supervisor liability. Likewise, this does not constitute deliberate indifference.

Defendant Thomas did not participate in the actions of Katz. Mr. Gregory argues that Defendant Katz made some mistakes on her competency test before she was allowed to become a hair microscopist. However, Defendant Thomas and Defendant Katz reviewed those mistakes and corrected them. Most importantly, Defendant Thomas did not have knowledge of a problem with the investigatory abilities Katz before this lawsuit. None of the supervisor defendants participated in the actions of the people they supervised nor did any of the defendants have knowledge of a problem with the

investigatory abilities of their subordinates before this lawsuit. Further, all of the supervisor defendants are dismissed from this lawsuit because they were not directly involved in any events that may give rise to negligent/intentional infliction of emotional distress, outrage, or malicious prosecution.

D. Eighth Amendment

The Eighth Amendment's protections do not attach until after conviction and sentencing. *Graham v.* Connor, 490 U.S. 386, 393 n.6, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). *See also Ingraham v. Wright*, 430 U.S. 651, 671 n.40, 97 S. Ct. 1401, 51 L. Ed. 2d 711 (1977). Mr. Gregory only complains of violations that occurred before his conviction and sentencing; therefore, his 8th Amendment claims must be dismissed.

E. Fabrication

1. Allegations against Clark and Carroll

A person's right to due process is violated when evidence is knowingly fabricated and a reasonable likelihood exists that the false evidence could have affected the decision of the jury. *Stemmler v. City of Florence*, 126 F.3d 856, 872 (6th Cir. 1997). Mr. Gregory alleges that Defendants Clark and Carroll fabricated notes stating that they did not tell Mr. Gregory what items were stolen from Ms. V.'s apartment and they later overheard Mr. Gregory talking to someone on the phone about the items stolen from Ms. V. apartment (Dkt. # 96). Mr. Gregory alleges that Defendants Clark and Carroll did tell him what the items were (*Id.*).

Defendants Clark and Carroll argue that they should receive absolute immunity because the alleged fabricated notes

were the basis of their testimony at Mr. Gregory's trial (Dkt. # 70). The Supreme Court has held that police officers have absolute immunity for testimony at trial. *Briscoe v. LaHue*, 460 U.S. 325, 345-46, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983). In *Briscoe,* one set of police officers gave false testimony suggesting that the defendants had harmonized their stories before talking to the police. *Id.* at 327. Similarly, in this case, the police allegedly falsely testified that they did not tell Gregory what items were taken from the rape victim's apartment even though Gregory claims that they told him about the items. Further, since DNA evidence has conclusively determined that Gregory was not the rapist, Gregory would have no way of knowing what items were stolen.

Generally, defendants do not have absolute immunity for non-testimonial acts prior to giving testimony. *See Spurlock v. Satterfield*, 167 F.3d 995, 1001 (6th Cir. 1999). However, merely agreeing to falsify testimony or forming a conspiracy to testify falsely does not constitute non-testimonial acts. *Id.* at 1002-03. Similarly, in this case, filing a false report and later testifying consistently with the report is not a non-testimonial act because the testimony and the report have essentially the same content. Creating a false report is very similar to forming a conspiracy or agreeing to testify falsely. When the report is written, the author has decided to give false testimony which would be indistinguishable from actually talking to someone about falsifying his testimony. In *Spurlock,* the non-testimonial acts were numerous, severe, and distinct acts: the defendants coerced a witness to give false testimony, videotaped the testimony twice, and gave the witness hush money. *Id.* at 998-99. Those separate and distinct acts are not present in this case. Therefore, Defendants Clark and Carroll are entitled to absolute immunity on the fabricated evidence claim.

2. Allegations against Katz

Defendant Katz, who worked at the Kentucky State Police Laboratory, performed hair microscopy analysis on samples from pantyhose that Ms. V's attempted rapist wore as a mask and on standard samples from Mr. Gregory. Mr. Gregory's briefs explain the art of hair microscopy as follows:

> Human hairs consist of three basic components: the medulla, a group of specialized cells running down the center of the hair shaft which may be present or absent; the cortex, a cylinder of keratinized cells surrounding the medulla; and the cuticle, an overlapping layer of flattened cells which ranges from one to ten cells in thickness. The structure of a human hair resembles a common lead pencil: the medulla corresponds to the lead, the cortex to the wood and the cuticle to the paint on the pencil shaft. When questioned human hair and known human hairs are compared microscopically, a number of significant microscopic features may be examined, including the diameters of the hair shafts and the variation in diameter along the shafts of the hairs; color and transparency of the cuticle layers and the variation of these features along the hair shafts; the colors of the cortex and the variation in color along the hair shafts; the sizes, densities and distributions of pigment granules and the variations of these features along the hair shafts; the textures of the cortical cells; the presence of "cortical fusi" and "ovoid bodies" in the cortex of the hairs; and the presence or absence of "medullas" (or visible central cores), the morphologies of the medullas and their variation along the hair shafts. Based on their microscopic features, hairs may be classified as to the population ancestry

("race") of the individual they came from. The common "racial" categories are "caucasoid," "negroid" and "mongoloid."

(Dkt. # 77).

Defendant Katz examined seven hairs found in the stocking mask and compared them to Mr. Gregory's hair (Dkt. # 74). Defendant Katz's notes claim that she found 5 similar negroid head hairs (*Id.*). Defendant Katz did not document or disclose to the prosecutor that she found two dissimilar head hairs[1] (*Id.*). However, she noted that Mr. Gregory's hair and the hair from the stocking mask did not contain medullas but did contain ovoid bodies (*Id.*). When both the Defendant and Mr. Gregory's experts looked at the hairs, they found that Mr. Gregory's hair did contain medullas (*Id.*). Therefore, Mr. Gregory's hair was not a match to the rapist's hair (*Id.*). DNA tests were performed which also found that Mr. Gregory was not the rapist (*Id.*). Based on the DNA evidence, Mr. Gregory's conviction for the two rapes was vacated and he was released from prison (*Id.*).

Defendant Katz testified at trial that the hairs in the stocking cap matched Mr. Gregory's hair sample. Therefore, Mr. Gregory is now alleging that Defendant Katz knowingly fabricated the results of the hair analysis. Defendant Katz argues that police have absolute immunity for their testimony in court. Therefore, because her testimony was based on the results of her hair analysis, she should be immune from any

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[1] Mr. Gregory's expert claims that Mr. Gregory only found one additional Negroid head hair. The other head hair was a Caucasian head hair (Dkt. # 78).

liability for reporting that the hair matched when it did not. In *Briscoe,* the Supreme Court held that a police officer who testified falsely that a fingerprint was a match had absolute immunity from damages liability based on his testimony. *Briscoe*, 460 U.S. at 326-27. Likewise, in this case, even if Defendant Katz did testify falsely about the hair matching, she is absolutely immune from liability.

Mr. Gregory argues that absolute immunity does not protect the defendant's non-testimonial activities prior to giving testimony. *Spurlock*, 167 F.3d at 1001. However, in *Spurlock,* the defendants completed several non-testimonial acts such as conspiring to procure a witness's false testimony, coercing the witness to give false testimony, videotaping the witness's testimony on two occasions, and giving the witness hush money. *Id.* at 998-999. Likewise, preparing a report on hair analysis that serves as the basis for testimony is more similar to agreeing to falsify testimony than to doing discrete non-testimonial acts such as giving hush money or videotaping the witness's false testimony. Therefore, Defendant Katz has absolute immunity for the claim that she fabricated evidence.

F. Duty to investigate

Plaintiff alleges that Defendant Tarter failed to investigate the similarities between two rapes that occurred while Mr. Gregory was incarcerated and whether descriptions of the rapist matched Mr. Gregory. "This Court recognizes that an officer does not have to investigate independently every claim of innocence. But, this axiom does not suggest that an officer has no duty to investigate an alleged crime before making an arrest." *Gardenhire v. Schubert*, 205 F.3d 303, 318 (6th Cir. 2000). "[T]he officer must consider the totality of the circumstances, recognizing both the inculpatory and exculpatory evidence, before determining if he has probable

cause to make an arrest." *Id.* Further, the time of the arrest is the point where the officer's knowledge of evidence should be examined to determine if probable cause exists. *Klein v. Long*, 275 F.3d 544, 552 (6th Cir. 2001). "Where the police have sufficient inculpatory evidence to give rise to a determination of probable cause and they do not know of any exculpatory evidence, we have held that 'the failure to make a further investigation does not negate probable cause.'" *Id.* In this case, when Tarter arrested Mr. Gregory, he did not know of Ms. V's description of the rapist's penis as being small[2] and the other two rapes had not occurred. Therefore, he did not have a duty to investigate these things that occurred after Mr. Gregory was arrested.

H. Suggestive show-up

Mr. Gregory alleges that Defendant Tarter violated his constitutional rights by using a suggestive show-up procedure (Dkt. # 96). First, Ms. S was shown a photo display containing a photograph of the Mr. Gregory (*Id.*). However, Ms. S was unable to identify Mr. Gregory as her rapist (*Id.*). Five days after the crime, Defendant Tarter asked Mr. Gregory and his attorney Mark Gaston to come to the police station so that Mr. Gregory could stand in a line-up[3] with other men for Ms. S to identify (*Id.*). When Mr. Gregory and his attorney arrived at the police station, Defendant Tarter told Mr. Gregory that he could "expedite" the process if Mr.

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[2] Mr. Gregory has presented evidence from an expert urologist stating that Mr. Gregory's penis is 5 ½ inches flaccid, which is normal size (Dkt. # 96, Exh. 24).

[3] Generally, the term line-up is used when the witness must pick the assailant from a line of several people. A show-up is generally only one person.

Gregory would agree to a one-on-one show-up (*Id.*). Defendant Tarter asked Mr. Gregory to sign a "waiver of lineup form and consent for a one-on-one identification," but he did not tell Mr. Gregory that Ms. S had already failed to identify Mr. Gregory in a photo-pak. (*Id.*). Also, Defendant Tarter asked the prosecutor's permission before he performed the show-up, but he did not tell the prosecutor about the prior photo display (*Id.*). Defendant Tarter did not tell his supervisor about the photo display either (*Id.*).

Ms. S.'s description of the rapist did not fit the Mr. Gregory. Ms. S. described her attacker to the police as a black male, late 20s to mid 30s, with a slender to small build, short black and curly hair, with a round, clean-shaven face. The victim also indicated that her assailant felt very greasy around his neck and shoulder area. Mr. Gregory is 5 feet 11 ½ inches tall and had a potbelly at the time of his arrest. He had a full beard, which he had worn continually for ten years. In the summer of 1992, Mr. Gregory was 44 years of age.

"The Supreme Court has held that whether a defendant's due process rights are violated by the admission at trial of an unnecessarily suggestive lineup depends upon the totality of the circumstances surrounding the lineup or confrontation." *Hutsell v. Sayre*, 5 F.3d 996, 1005 (6th Cir. 1993).

> We turn, then, to the central question, whether under the "totality of the circumstances" the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of

> certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. 188, 199-200, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). A suggestive show-up implicates an evidentiary interest and "does not in itself intrude upon a constitutionally protected interest." *Hutsell*, 5 F.3d at 1005 (quoting *Manson v. Brathwaite*, 432 U.S. 98, 113, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977). "However,...in extraordinary circumstances, such as coercion or other police misconduct, a cause of action under § 1983 might be stated." *Id.*

In this case, Ms. S gave a description that did not fit Mr. Gregory, she could not identify Mr. Gregory from a photopak, and she was wrong about Mr. Gregory's eye color at the time she identified him in the show-up. Mr. Gregory alleges that Defendant Tartar deceived his supervisor, the prosecutor, and Mr. Gregory in order to stage a one-on-one show-up. Based on these facts, a reasonable jury could find that the show-up was suggestive and not reliable and an issue of police misconduct.

Defendant Tartar argues that since Mr. Gregory signed a waiver of line-up form, Mr. Gregory has waived his right to argue that the show-up was unconstitutional. Mr. Gregory counters that his waiver was not valid since he was not told that a photopak was already shown to the victim and Defendant Tartar also misled his supervisor and the prosecutor by not telling them either. To be a valid waiver, the person must intentionally relinquish a known right or privilege. *Schneckloth v. Bustamonte*, 412 U.S. 218, 239, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1972). The waiver must be voluntary in that it is "the product of free and deliberate choice rather than intimidation, coercion, or deception," and

it must be "knowing and intelligent" in that it is made with "the awareness of both the right being abandoned and the consequences of the decision to abandon it. Only if the totality of the circumstances...reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that...rights have been waived." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986). Mr. Gregory was told that he was coming to the station to stand in a line-up but when he got there Defendant Tartar had not prepared for the line-up and instead asked him to stand in a show-up. Mr. Gregory signed the waiver but Mr. Gregory was misled by the Defendant because Mr. Gregory was not told that the victim could not identify Mr. Gregory in a photopak. At the very least, these facts create a jury issue as whether Mr. Gregory knowingly, intelligently, or voluntarily waived his right.

I. Probable Cause and Malicious Prosecution/False Arrest

1. Clark and Carroll

Mr. Gregory claims that Defendants Clark and Carroll did not have probable cause to arrest him. "A law enforcement officer is entitled to rely on an eyewitness identification to establish adequate probable cause with which to sustain an arrest." *Ahlers v. Schebil*, 188 F.3d 365, 370 (6th Cir. 1999). Unless, at the time of the arrest, the officer believes that the eyewitness was lying, gave an inaccurate description, or mistaken. *Id.* Defendants Clark and Carroll had probable cause to arrest Mr. Gregory for Ms. V's rape because Ms. V identified Mr. Gregory and swore out a warrant for Mr. Gregory's arrest. Defendants Clark and Carroll were not involved in Ms. V's identification. Ms. V identified Mr.

Gregory upon seeing him in her apartment complex parking lot.

Although the 6th Circuit has not set forth the elements for a malicious prosecution action, the 6th Circuit has stated that there must be no probable cause to justify the arrest and prosecution. *Thacker v. City of Columbus*, 328 F.3d 244, 259 (6th Cir. 2003). Since Defendants Clark and Carroll had probable cause to arrest Mr. Gregory, the action for malicious prosecution against them must be dismissed.

2. Tarter

Mr. Gregory claims that Defendant Tarter lacked probable cause for his arrest and continuing prosecution. Defendant Tarter arrested Mr. Gregory for the rape of Ms. S when the evidence to support probable cause was a one-on-one show-up and similarities to the rape of Ms. V. Further, Defendant Tarter testified later in front of the grand jury to secure an indictment of Mr. Gregory. "An investigator may be held liable under § 1983 for making material false statements either knowingly or in reckless disregard for the truth to establish probable cause for an arrest." *Vakilian v. Shaw*, 335 F.3d 509, 517 (6th Cir. 2003) (citing *Ahlers*, 188 F.3d at 373). "To overcome an officer's entitlement to qualified immunity, however, a plaintiff must establish: (1) a substantial showing that the defendant stated a deliberate falsehood or showed reckless disregard for the truth and (2) that the allegedly false or omitted information was material to the finding of probable cause." *Vakilian v. Shaw*, 335 F.3d at 517. An officer is entitled to rely on an eyewitness identification unless the officer has reason to believe that the victim was lying, gave an inaccurate description, or mistaken. *Ahlers*, 188 F.3d at 370.

The jury may find that Defendant Tartar had several reasons for believing Ms. S was mistaken, but he omitted material facts from his grand jury testimony showing a reckless disregard for the truth. First, Ms. S described her assailant as 25-30 years old, dark eyes, medium complexion, short, curly hair, thin build, greasy around the neck and shoulders (Dkt. # 96). In contrast, Mr. Gregory was 44 years old, 5'11', brown eyes, and straightened black hair that was long on the sides and short in the back (*Id.*). However, the most significant discrepancy was that Mr. Gregory had a beard and mustache, which he had worn consistently for years (*Id.*). Ms. S described her rapist as clean-shaven (*Id.*). Significantly, Ms. S should have known whether the rapist was clean-shaven because he french-kissed her during the attack (*Id.*). Then, five days after the attack, Ms. S viewed Mr. Gregory in a one-on-one show-up (*Id.*). Mr. Gregory had a beard as he had for years (*Id.*). Defendant Tarter should have known that it was very unlikely that Mr. Gregory had grown a full beard and mustache in five days (*Id.*). Further, Ms. S identified Mr. Gregory only by his grey eyes when, in fact, Mr. Gregory has brown eyes (*Id.*). The only other evidence that Defendant Tarter had was that Mr. Gregory had been arrested for the attempted rape of Ms. V. Ms. V and Ms. S lived in the same apartment complex and both had been attacked by a naked African American man with a knife in their apartments in the early morning hours. A reasonable jury could conclude that Tarter lacked probable cause to arrest Mr. Gregory and Defendant Tarter recklessly disregarded the truth by omitting material facts from his grand jury testimony.

3. Katz

Defendant Katz argues that the malicious prosecution claim against her should be dismissed because without her analysis of the hair, probable cause still existed (Dkt. # 67).

Mr. Gregory argues that if Katz had properly performed the hair microscopy tests, the hair evidence would have been exculpatory and weighed against a finding of probable cause (Dkt. # 77). The probable cause to arrest Mr. Gregory was based on what the officers knew at the time of the arrest. At that time probable cause to arrest Mr. Gregory was based on the eyewitness testimony of Ms. V. While the proceedings may not have continued against Mr. Gregory if the truth about the hair evidence exculpating Mr. Gregory had been known, this seems to be a question of whether there was a Brady violation not probable cause. The cause of action against Katz for malicious prosecution is dismissed.

I. *Brady* claims

1. Generally

The suppression of exculpatory evidence "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). "[E]vidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Zuern v. Tate*, 336 F.3d 478, 484 (6th Cir. 2003) (quoting *Kyles v. Whitley*, 514 U.S. 419, 433-434, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995)) (internal quotation marks omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)) (internal quotation marks omitted). "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a

verdict worthy of confidence." *Kyles*, 514 U.S. at 434. "The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict." *Id.* at 435.

In its previous opinion, this Court did not state what level of intent is necessary for a *Brady* violation to be actionable under § 1983. The standard for a *Brady* violation must be at least "knowing" because defendants have qualified immunity for all but knowing violations of constitutional rights. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271.

2. Failure to disclose the existence of a Fourth Rape

Mr. Gregory alleges that Defendant Tarter knew about the Fourth Rape but failed to disclose it to the Prosecutor (Dkt. # 96). Defendant Tarter counters that Mr. Gregory has not established that Tartar knew about the rape (Dkt. # 99). However, Mr. Gregory has at least raised a question of material fact about this issue by citing to Officer DeSpain's deposition testimony (Dkt. # 96). Officer DeSpain testified that he discussed the case with Defendant Tarter on an ongoing basis (Dkt. # 96, Exh. 38). Therefore, Defendant Tarter may have had information about the fourth rape but did not disclose it to the prosecutor.

After Mr. Gregory was in jail awaiting trial, two other people were raped with a similar modus operandi as the two rapes for which Mr. Gregory was charged (Dkt. # 96). The existence of a third similar rape was disclosed at trial (*Id.*). Another similar rape may have been dismissed by the jurors as coincidence. However, if the fourth rape had been presented to jurors, they may have decided that someone besides the Mr. Gregory was raping women in Louisville. "Materiality under *Brady* presents a mixed question of law

and fact." *U.S. v. Phillip*, 948 F.2d 241, 250 (6th Cir. 1991). Mixed questions of law and fact are for the jury to decide. *U.S. v. Gaudin*, 515 U.S. 506, 512, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). Whether the existence of the fourth rape was material is a question for the jury in this case to decide.

3. Failure to disclose the existence of a dissimilar head hairs

Mr. Gregory alleges that Defendant Katz failed to disclose that one or possibly two head hairs that she found in the stocking mask were not Mr. Gregory's hairs (Dkt. # 74). In reality, all of the head hairs from the stocking mask were dissimilar from Mr. Gregory's (*Id.*). In this case, there is a question of whether Defendant Katz's failure to disclose one or two dissimilar head hairs is material. Therefore, this is a question for the jury. There also is an issue of whether Defendant Katz knowingly falsely reported the similarity of the five hairs. Likewise, this is a question for the jury.

4. Other Possible Brady Violations

Mr. Gregory alleges two other Brady violations (Dkt. # 96). First, Mr. Gregory alleges that Defendants Clark and Carroll were under a duty to disclose that they lied about not telling the prosecutor or Mr. Gregory what items were stolen from Ms. V's apartment (*Id.*). Second, Defendant Tarter did not tell the prosecutor or Mr. Gregory that Ms. S identified Mr. Gregory by his grey eyes (*Id.*). "No Brady violation occurs, however, 'where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available from another source.'" *Workman v. Bell*, 178 F.3d 759, 767 (6th Cir. 1998). In this case, Mr. Gregory knew that Defendants Clark and Carroll had in fact told him the items

that were stolen (Dkt. 499). In fact, Mr. Gregory testified during his trial that he had been told the items (*Id.*). Second, Mr. Gregory elicited the fact that Ms. S recognized Mr. Gregory by his grey eyes on cross-examination during his trial (*Id.*). Further, Mr. Gregory presented testimony that his eyes were in fact brown (*Id.*). Therefore, Mr. Gregory knew of the essential facts and took advantage of the exculpatory information for both allegations.

J. Conspiracy

In support of Mr. Gregory's claim of conspiracy. Mr. Gregory alleges that Tarter, Carroll, and Clark spoke with each other about the investigation (Dkt. # 96). The 6th Circuit has stated the following regarding § 1983 conspiracy:

> A civil conspiracy is an agreement between two or more persons to injure another by unlawful action. Express agreement among all the conspirators is not necessary to find the existence of a civil conspiracy. Each conspirator need not have known all of the details of the illegal plan or all of the participants involved. All that must be shown is that there was a single plan, that the alleged coconspirator shared in the general conspiratorial objective, and that an overt act was committed in furtherance of the conspiracy that caused injury to the complainant.

Spadafore v. Gardner, 330 F.3d 849 (6th Cir. 2003). Mr. Gregory agrees that Clark, Carroll, and Tarter all spoke about the case (Dkt. # 99). However, no evidence has been presented that they agreed to convict Mr. Gregory even though he was innocent. Certainly, there has to be more evidence than the police officers were doing their jobs to find that they formed a conspiracy to violate Mr. Gregory's rights.

K. Municipal Liability

A city's failure to train is actionable under § 1983 when it reflects the city's deliberate indifference to the constitutional rights of its citizens. *City of Canton v. Harris*, 489 U.S. 378, 392, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989). "To be actionable, a municipality's training must be inadequate to the tasks that its officers must perform, this inadequacy must be the product of deliberate indifference, and this inadequacy must have been closely related to or have actually caused the plaintiffs injury." *Cherrington v. Skeeter*, 344 F.3d 631, 646 (6th Cir. 2003). The 6th Circuit has given two instances where a failure to train would be actionable:

> One is failure to provide adequate training in light of foreseeable consequences that could result from the lack of instruction, as would be the case, for example, if a municipality failed to instruct its officers in the use of deadly force. A second type of situation justifying a conclusion of deliberate indifference is where the city fails to act in response to repeated complaints of constitutional violations by its officers.

Id. See also *Brown v. Shaner*, 172 F.3d 927, 931 (6th Cir. 1997). The city may be liable for a single decision if it can be shown that the city council or similar legislative body took the single action. *Pembaur V. City of Cincinnati*, 475 U.S. 469, 480, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986). In this case, Defendants were trained about proper identification techniques. Further, no showing of other complaints has been made. Mr. Gregory also alleges that the City failed to properly discipline Defendant Carroll (Dkt. # 96). However, Mr. Gregory cannot show that the City was deliberately indifferent to his rights because there is no causal connection

between Defendant Carroll's private domestic dispute and his alleged fabrication of evidence[4].

L. Negligent Infliction of Emotional Distress

Physical contact is required in "negligent infliction" cases to corroborate the plaintiffs emotional injury. *Deutsch v. Shein*, 597 S.W.2d 141, 146. Consequently, the requisite contact may be "slight, trifling, or trivial." *Id.* However, for recovery to lie, the thing that causes the mental distress must also be the thing that comes into contact with the plaintiff. *Wilhoite v. Cobb*, 761 S.W.2d 625, 626; *see Deutsch*, 597 S.W.2d at 146; *Hetrick v. Willis*, 439 S.W.2d 942 (Ky. 1969); *Ky. Traction & Terminal Co. v. Roman's Guardian*, 232 Ky. 285, 23 S.W.2d 272, 275 (Ky. 1929). The claimed injuries were caused by the failure to provide exculpatory evidence to the prosecutor, fabrication of evidence, and suggestive line-ups, where no physical contact occurred. The alleged physical contact was Mr. Gregory's being taken into custody and being physically restrained in prison. The events causing mental injury did not create contact with the Mr. Gregory, so Mr. Gregory has failed to state a cause of action for negligent inflictions of emotional distress against the remaining defendants. Therefore, this cause of action is dismissed as to all defendants.

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[4] Mr. Gregory's claim is that Defendant Carroll lied during the investigations of his domestic dispute. However, Defendant Carroll was never even charged with lying. Therefore, Defendant Carroll could not be disciplined because he was not charged.

M. Intentional Infliction of Emotional Distress

The plaintiff must show four elements to establish intentional infliction of emotional distress: "the wrongdoer's conduct must be intentional or reckless; the conduct must be outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; there must be a causal connection between the wrongdoer's conduct and the emotional distress and the distress suffered must be severe.[5]" *Osborne v. Payne*, 31 S.W.3d 911, 913-14 (Ky. 2000). First, the intentional or reckless element is satisfied "where the wrongdoer had the specific purpose of inflicting emotional distress or where he intended his specific conduct and knew or should have known that emotional distress would likely result." *Craft v. Rice*, 671 S.W.2d 247, 249 (Ky. 1984). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Seitz*, 796 S.W.2d at 3. When other traditional torts are stated and emotional injuries are recoverable, the tort of intentional infliction of emotional distress or outrage is not actionable unless defendant's conduct was intended solely to cause extreme emotional distress. *Banks v. Fritsch*, 39 S.W.3d 474, 481 (Ky. Ct. App. 2001). Under Kentucky law, damages for emotional distress are recoverable in an action for malicious prosecution. See Palmore, Kentucky Instructions to Juries § 27.04 (Civil) (4th Ed. 1989). Therefore, Mr. Gregory's claim for intentional infliction of

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[5] The tort of outrageous conduct and intentional infliction of emotional distress are the same tort with two different names in Kentucky. See *Humana of Kentucky, Inc. v.* Seitz, 796 S.W.2d 1, 2-3 (Ky. 1990) (applying the same elements as above).

emotional distress must be dismissed as to all defendants because he has alleged malicious prosecution against them.

N. False Arrest/False Imprisonment

False arrest or imprisonment is actionable "when the arrest or imprisonment is without legal authority. Where the arrest is made under authority of a valid process, the remedy is an action for malicious prosecution." *Rader v. Parks*, 258 S.W.2d 728, 729 (Ky. 1953). *See also*, *Banks v. Fritsch*, 39 S.W.3d 474 (Ky. Ct. App. 2001) ("[F]alse imprisonment requires that the restraint be wrongful, improper, or without a claim of reasonable justification, authority or privilege."). Defendants Carroll and Clark arrested Mr. Gregory pursuant to a valid warrant. Therefore, Mr. Gregory has no cause of action for False Arrest/False Imprisonment against them. Defendant Tarter arrested Mr. Gregory without a warrant (Dkt. # 70). Defendant Tarter argues that he had authority under Ky. Rev. Stat. Ann. § 431.005. Under that statute, for an officer to make an arrest in a felony case, the officer must have probable cause. Ky. Rev. Stat. § 431.005(1)(c). Whether probable cause existed is a question for the jury and dependent on the outcome of the jury's findings of whether Defendant Tarter relied on a suggestive and unreliable show-up.

O. Malicious Prosecution under Kentucky Law

Mr. Gregory has brought malicious prosecution claims against Defendants Carroll, Clark, Katz, and Tarter. A plaintiff seeking to recover under Kentucky law for malicious prosecution must prove the following six elements:

1) the institution or continuation of judicial, administrative or disciplinary proceedings.

2) by, or at the behest of, the defendant,
3) the termination of such proceedings in plaintiff's favor,
4) malice in the institution of such proceeding,
5) a lack of probable cause for the proceeding, and
6) damages.

Raine v. Drasin, 621 S.W.2d 895, 899 (Ky. 1981). This cause of action is dismissed as to Defendants Carroll, Clark, and Katz because they did not institute proceedings against Mr. Gregory instead Ms. V instituted the action against Mr. Gregory by swearing out a warrant. Also, the proceeding was based on probable cause which had been established by Ms. V's eyewitness identification. Mr. Gregory has presented some evidence to show that Defendant Tarter proceeded with a lack of probable cause by using a show-up which may be suggestive and unreliable. This is a question for the jury. "[M]alice necessary to sustain the action may be presumed from a want of probable cause." *F.S. Marshall Co. v. Brashear*, 238 Ky. 157, 37 S.W.2d 15, 16-17 (Ky. Ct. App. 1931). *See also Sweeney v. Howard*, 447 S.W.2d 865 (Ky. 1969).

This Court **GRANTS in part and DENIES in part** the motions for summary judgment.

This is the 24 day of March, 2004.

/s/
Thomas B. Russell, Judge
United States District Court

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 3:01CV-535

[Filed March 29, 2004]

WILLIAM THOMAS GREGORY, PLAINTIFF	)
v.	)
CITY OF LOUISVILLE, ET AL., DEFENDANTS	)

ORDER

Upon the Plaintiff's and the Defendant's Motions for Summary Judgment, Responses, and Replies (Dkt. Nos. 67, 70, 71, 74, 77, 78, 79, 86, 87, 88, 96, 99) and the Court being sufficiently advised,

IT IS ORDERED:

Defendant's Motions for Summary Judgment are **GRANTED** in part and **DENIED** in part.

Defendants City of Louisville, Louisville Division of Police, Joe Carroll, Steve Clark, Hope Greer, Luanne Thomas, Darrell Amon, Wayne Kessinger, Jay Pierce, and Eugene Sherrard are dismissed from this case. The following claims are not dismissed:

1. Claims against Defendant Katz for Brady violations arising from the hair examination and failure to disclose the results.

2. Claims against Defendant Tarter based on a suggestive line-up and for Malicious Prosecution and False Imprisonment/False Arrest under State and Federal law and for a Brady violation in failing to disclose the Fourth Rape.

This is the 24 day of March, 2004.

/s/
Thomas B. Russell, Judge
United States District Court

APPENDIX E

LINE-UP WAIVER AND CONSENT FOR A ONE-ON-ONE IDENTIFICATION

I, William Thomas Gregory, hereby waive my right and priviledge to stand in a line-up for a possible identification concerning crimes or offenses for which I am a suspect. I hereby agree to stand in a one-on-one system of identification before witnesses or victims of crimes or offenses of which I am a suspect for the purposes of identification. I have not been threatened or promised anything by any officers or detectives of the Louisville Division of Police to persuade me to sign this form and to be viewed in a one-on-one. I am signing this form freely and voluntarily. I am fully aware of the nature of this process and realise the consequences of an identification and intelligently waive my right to a police line-up.

Crime or offense for which the one-on-one identification is being used Rape 1st, Burglary 1st, Assault 1st.

SIGNED /s/ William Gregory

DATE 7/24/92 TIME 3:05 p.

WITNESSED /s/_____

/s/_____

APPENDIX F

SUPREME COURT OF KENTUCKY

No. 93-SC-878-MR

[Filed December 14, 1994]

WILLIAM THOMAS GREGORY)
APPELLANT)
)
v.)
)
COMMONWEALTH OF KENTUCKY)
APPELLEE)

APPEAL FROM JEFFERSON CIRCUIT COURT
DIVISION 1
HON. JOHN WOODS POTTER, JUDGE
92-CR-3190-MR

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant was convicted by a Jefferson Circuit Court for two counts of burglary in the first degree, rape in the first degree of Ms. S., and attempted rape in the first degree of Ms. V. He was sentenced to twenty years for the rape and for each burglary offense and ten years for the attempted rape, to

be served consecutively, for a total of seventy years. We affirm.

On the morning of June 1, 1992, Ms. V., age 20, was attacked in the bedroom of her Breckenridge Square apartment by a nude man wearing a stocking over his head. After a struggle, Ms. V. escaped to a neighbor's apartment and the police were called. On June 3, 1992, the appellant, who lived in the same apartment complex as Ms. V. was arrested for burglary and attempted rape after Ms. V. swore out a warrant.

On July 19, 1992, Ms. S., age 72, was attacked by a nude man in her apartment, which is located in the same apartment complex as that of appellant and Ms. V. Ms. S. went to the police station and viewed a photopack containing the appellant's picture; she was unable to identify the appellant. On July 24, 1992, the appellant was called to the stationhouse to stand in a line-up. The appellant arrived at the stationhouse with his attorney and was told that it would take time to assemble the appropriate other people for the line-up. The police then asked if he would consent to a one-on-one show-up. The appellant consented and signed a waiver evidencing his consent. At the show-up, Ms. S. asked the appellant to repeat various phrases that were said to her during the attack. Later, Ms. S. stated that the she was sure the appellant was her attacker.

Appellant contends the trial court erred by failing to hear the merits of his motion to suppress Ms. S.'s show-up identification; failing to grant a directed verdict on rape in the first degree; refusing the defense request to individually voir dire the jurors about possible racial prejudice; and refusing to give the appropriate burden of proof instruction.

With respect to appellant's refusing to hear the merits of his motion to suppress the identification by Ms. S, appellant states that one-on-one show-up identifications are inherently unreliable and suspect, citing *Stovall v. Denno*, 388 U.S. 393 (1967). The appellant recognizes, however, that this court has upheld the validity of show-up identifications in certain circumstances. *See Sweatt v. Commonwealth*, Ky., 550 S.W.2d 520 (1971) (show-up identification valid when witness in the hospital); *Stidham v. Commonwealth,* Ky., 444 S.W.2d 110 (show-up valid when police need to act quickly to establish probable cause). Appellant argues that these recognized exceptions do not apply to his particular situation, and they do not. However, the appellant signed a waiver, consenting to the show-up procedure. We will now address the validity of that waiver.

The trial court held that the appellant waived his right to contest the identification procedure when he consented to participate in the show-up. Appellant contends his waiver is invalidated by the fact the police did not inform him that Ms. S. was previously unable to identify him in a photopack. He argues that his lack of knowledge of this fact renders his waiver involuntary. We disagree.

The U.S. Supreme Court has addressed a similar issue when looking at a waiver of one's Miranda rights and the privilege against self-incrimination. The U.S. Supreme Court held that a valid waiver does not require that the defendant be given all of the information that might be useful in making a decision to waive his rights. *Moran v. Burbine*, 475 U.S. 412, 422 (1986).

In *Burbine*, the defendant confessed to a murder after executing a waiver of his *Miranda* rights. Before obtaining the confession, the police did not tell the defendant that an

attorney retained by the defendant's sister had called the police station and been assured that the defendant would not be questioned until the following day. Burbine contended that the police failure to disclose to him that an attorney had been retained to represent him rendered his *Miranda* waiver involuntary. The Supreme Court rejected this argument stating:

> Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right.
>
> . . .
>
> No doubt the additional information might have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never held the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.

Burbine, at 1141.

Simply because appellant was not apprised of the fact that a previous identification attempt had failed, his consent to the show-up cannot be considered involuntary. The ruling by the trial court on the voluntariness of the waiver is correct and should not be disturbed.

Now that we have established the consent was not involuntary, we must determine exactly what the appellant waived when he signed the consent to the show-up. The consent form reads as follows:

> I, William Thomas Gregory, hereby waive my right and privilege to stand in a line-up for a possible identification concerning crimes or offenses for which I am a suspect. I hereby agree to stand in a one-on-one system of identification before witnesses or victims of crimes or offenses of which I am a suspect for the purposes of identification.
>
> I have not been threatened or promised anything by any officers or detectives of the Louisville Division of Police to persuade me to sign this form and to be viewed in a one-on-one. I am signing this form freely and voluntarily. I am fully aware of the nature of this process and realize the consequences of an identification and intelligently waive my right to a police line-up.

The trial court concluded that because of this waiver, the appellant waived has right to contest the procedure and its results. We agree.

Appellant contends that a waiver of a prospective procedure is involuntary as a matter of law, because otherwise, the police could obtain a waiver and then force the witness to identify the accused. In such a situation, the accused would have no ability to contest the procedure. We do not find any merit to this argument.

In *Barker v. Stearns Coal & Lumber Co.*, this court stated:

> The common definition of a legal waiver is that it is a voluntary and intentional surrender or relinquishment of a known right, or an election to forego an

> advantage which the party at his option might have demanded or insisted upon.
> *Barker*, at 470.

In the case at bar, the language of the waiver indicates that a defendant has a right to a line-up instead of a show-up. The last sentence indicates that the appellant was aware of the nature of the process. This is furthered by the fact that the appellant's attorney was present during the decision to consent to the show-up. The attorney's background and experience afford the appellant a wealth of information to determine all the possible consequences of his decision. The appellant knew what the procedure would be and there is no evidence to indicate the appellant was subjected to anything more than what he expected. Without such a showing, this court cannot conclude the appellant's right to due process has been violated. The appellant voluntarily and intentionally "elect[ed] to forego an advantage which [he] at his option might have demanded or insisted upon." *Id.*

The Appellant further contends that the trial court erred when it failed to grant a directed verdict on rape in the first degree. This court stated in *Commonwealth v. Sawhill*, Ky., 660 S.W.2d 3 (1991), that the appropriate standard in determining the sufficiency of the evidence for a directed verdict is:

> With the evidence viewed in the light most favorable to the Commonwealth, if the totality of the evidence is such that the trial judge can conclude that reasonable minds might fairly find guilt beyond a reasonable doubt, then the evidence is sufficient and the case should be submitted to the jury. If the evidence cannot meet this test it is insufficient and a directed verdict should be granted. *Id.* at 5.

In *Commonwealth v. Benhan*, Ky., 816 S.W.2d 186 (1991), this court stated:

> On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal. *Id.* at 188.

In the case at bar, when asked if she were penetrated, Ms. S. stated, "I think it did. I think. I'll tell you, I was so frightened at that time, I can't swear to that completely." The prosecution then produced a forensic pathologist who testified that there was a red discoloration at the entrance to the vaginal canal. Also, the medical examination form from Humana Hospital University of Louisville reveals bruising to the hymen. After hearing the testimony at trial, the jury found that the victim had been penetrated. It is well settled that "[t]he fact of penetration, may be proved by the circumstances." *Causey v. Commonwealth*, Ky., 550 S.W.2d 494 (1977); *Paenitz v. Commonwealth*, Ky., 820 S.W.2d 480 (1992); *Jones v. Commonwealth*, Ky., 833 S.W.2d 839 (1992).

With the testimony of the victim and the doctor, coupled with the Humana report, this court cannot say that it would be completely unreasonable for the jury to find that the victim had been penetrated. The trial court therefore, appropriately declined to order a directed verdict on the charge of rape in the first degree and its decision on these grounds must be affirmed.

Appellant next contends that the trial court erred by refusing to individually voir dire the jurors about possible racial prejudice. The trial court noted that there were certain

topics about which it was difficult to get information in a group, and that interracial rape or interracial marriage may be two of them, but denied the motion for individual voir dire. The trial judge relied on the "local legal culture" which was reflected in court rules and decisions and the common practice not to have individual voir dire. Further, the trial judge ruled that because the court rules specifically provide for individual voir dire in certain designated cases, this suggests that individual voir dire is not to be conducted in other cases. In so deciding, the trial judge did not abuse his discretion.

Appellant, through counsel asked the prospective jurors about their possible racial prejudice as follows:

> . . . . Is there anyone here who thinks that because it was a black man, because it was an African American, and it was a white woman, that it is more serious or should be treated more harshly or is it something that is simply beyond pale and is something difficult to think about?

After receiving no response from any of the prospective jurors, counsel continued:

> . . . . There are people, both black and white, who feel very strongly about interracial relationships, that they disapprove of them. I need to know, I need to know if any of you feel that way. If you do, it's alright to say; I realize this is the most difficult thing I could ask you."

There are certain situations that require a judge to voir dire the potential jurors about possible racial prejudice. *Ham v. South Carolina*, 409 U.S. 524 (1973); *Ristaino v. Ross*, 424 U.S. 589 (1967); *Turner v. Murray*, 476 U.S. 28 (1986).

Appellant fails to realize that though the trial judge is required to voir dire the prospective jurors about certain topics in certain situations, he is afforded discretion in determining how to perform this task. In *Turner v. Murray*, the Supreme Court stated, "[t]he rule we propose is minimally intrusive; as in other cases involving 'special circumstances,' the trial judge retains discretion as to the form and number of questions on the subject, including whether to question the venire individually or collectively." *Turner*, at 37.

In the case at bar, the trial judge chose to have the venire collectively questioned. For whatever the reason he chose to do so, it is not an abuse of discretion. Due process violations only occur where the judge should have questioned the venire and did not do so. There is no violation where the judge asks, or allows to be asked, the appropriate questions, even though they are not asked in the manner the defendant wants. Therefore, there is no due process violation for the judge's failure to individually voir dire the prospective jurors.

Lastly, appellant contends that the trial judge erred by refusing to give the jury his burden of proof instruction. This court has repeatedly stated that "a specific instruction on who has the burden of proof is not required." *Skaggs v. Commonwealth*, Ky., 694 S.W.2d 672, 680 (1985); *Gall v. Commonwealth*, Ky., 607 S.W.2d 97, 110 (1990); *Whorton v. Commonwealth*, Ky., 570 S.W.2d 672 (1978). In *Whorton*, this Court announced its policy that,

> We have sought to avoid abstract legal principles, presumptions [footnote omitted], comments on the weight of the evidence, and references to the burden of proof . . .This approach minimizes the possibility

of intrusion by the judge into that particular area of decision making which belongs exclusively to the jury. *Id.*, at 631-2.

The appellant's contention that his instruction would help jurors better understand how they are to view the case cuts across the grain of the policy in this state to keep the instructions simple and not tread on the process by which jurors make their decisions. The appellant's argument is simply not compelling enough to overrule this line of cases.

The decision of the trial court is affirmed.

All concur.